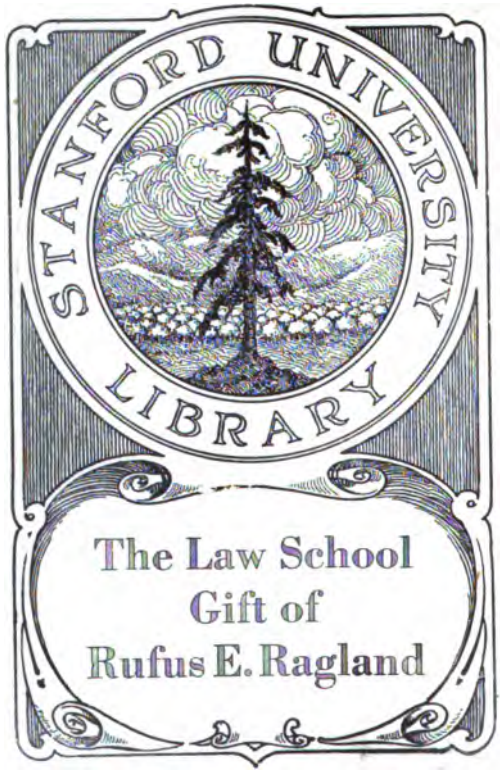

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A TREATISE ON

PLEADING AND PRACTICE

IN THE COURTS OF RECORD OF

NEW YORK

INCLUDING PLEADING AND PRACTICE IN ACTIONS GENERALLY
AND IN SPECIAL ACTIONS AND PROCEEDINGS
AND APPELLATE PROCEDURE

WITH FORMS

BY

CLARK A. NICHOLS

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FOR THE AUTHOR
MATTHEW BENDER & CO.
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§ 2508. Contents of volume and how divided.

This book is confined to a consideration of questions relating to appellate practice. It treats of appeals to the court of appeals, to the supreme court, and to the county court, except that appeals from particular city courts are not considered except as regulated by general Code provisions.

The book is divided into three parts. The first part covers appeals to the court of appeals and to the supreme court, with the limitations already stated, except appeals from surrogate's courts. It will embrace all the Code provisions found in the Code chapter (17) relating to appeals.

The second part is confined to a consideration of appeals from a surrogate's court to the appellate division of the supreme court. The right to appeal, and the procedure, is governed by the Code provisions (§§ 2568–2589) found in the chapter relating to surrogates' courts. For that reason, such appeals are treated separately.

The third part is devoted to appeals to the county court from a justice of the peace court. The Code provisions relating thereto (§§ 3044–3073) are found in the chapter on Courts of Justices of the Peace.

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§ 2509. Definition.

An appeal is the removal of a case from an inferior to a superior jurisdiction, to correct errors of the court of inferior

jurisdiction.[1] The word is sometimes applied to the removal of a matter from the decision of an inferior officer to a superior officer, but this is not, in law affairs, an accurate use of the term.[2]

§ 2510. Mode of review.

The remedy by appeal was unknown to the common law but in place thereof were the writs of error and of certiorari. Appeals were proper only in equity cases, before the Codes, but now an appeal is the remedy in both legal and equitable actions. Practically all judgments and orders in actions, and orders in special proceedings, are now reviewable, either directly or indirectly, by appeal.

—— **Writ of error.** Before the Codes, judgments in common-law actions were reviewed by writ of error while decrees in chancery were reviewed by appeal. The old Code abolished the distinction between actions at law and suits in equity and it necessarily followed that the mode of review should be the same whether the action was formerly cognizable at common law or in equity. In pursuance of such scheme, the writ of error was abolished.[3] The writ of error was an original writ, a writ of right, and when sued out was the commencement of a new suit. Being a new suit, it followed that the statute of limitations applied.

—— **Writ of certiorari.** A writ of certiorari is not permissible to review a determination where the determination can be adequately reviewed by an appeal to a court or to some other body or officer.[4]

—— **Mandamus.** Where there is an adequate remedy by appeal, mandamus does not lie.[5] Where a plaintiff rightfully claims a preference on the trial calendar, and defendant does not oppose the motion, but the application is denied, the rem-

[1] People v. Justices of Marine Court, 11 How. Pr. 400.
[2] Elliott's App. Proc. p. 15.
[3] Code Civ. Proc. § 1293.
[4] Code Civ. Proc. § 2122, subd. 2.
[5] People ex rel. Metropolitan St. R. Co. v. Roesch, 27 Misc. 44, 57 N. Y. Supp. 295; People ex rel. Wright v. Coffin, 7 Hun, 608.

edy is by mandamus rather than by appeal;[6] but the mere fact that there is no respondent, and the controversy is with the court below and not with an adverse party, does not preclude an appeal where mandamus would not lie.[7]

§ 2511. Existence of other remedies in lower court.

It is oftentimes necessary to make a motion in the trial court before taking an appeal. The trial court should ordinarily be given a chance to itself correct its errors before the proceedings are transferred to another tribunal for review.

—— **Motion to modify, amend, or vacate.** A default judgment or order,[8] or an ex parte order,[9] is not directly appealable, but a motion to vacate must first be made in the trial court and then an appeal may be taken from the order if the motion is denied. The Code expressly provides that certain orders in supplementary proceedings cannot be reviewed in the first instance by appeal but a motion to vacate must be made and the appeal taken from the order denying the motion.[10]

If a judgment or order is merely irregular, the remedy, in the first instance, is by a motion and not by an appeal.[11] For instance, where there is a mistake in the judgment or order entered,[12] or in the form of the judgment,[13] or where the judgment contains an unauthorized provision,[14] or where the judgment does not show that the recovery is in a representative

[6] Hayes v. Consolidated Gas Co., 143 N. Y. 641.

[7] Katz v. Diamond, 16 Misc. 577, 38 N. Y. Supp. 766.

[8] See post, § 2570.

[9] See post, § 2522.

[10] Vol. 3, pp. 3267–3269.

[11] Sluyter v. Williams, 37 How. Pr. 109; Beers v. Shannon, 73 N. Y. 292.

[12] Union Nat. Bank v. Kupper, 63 N. Y. 617. Error in amount based on mistake. Loy v. Metropolitan El. R. Co., 15 App. Div. 1, 43 N. Y. Supp. 1158.

[13] Wright v. Nostrand, 94 N. Y. 31, 41; Buck v. Remsen, 34 N. Y. 383; Young v. Atwood, 5 Hun, 234.

[14] Sabater v. Sabater, 7 App. Div. 70, 39 N. Y. Supp. 958; Shrady v. Van Kirk, 77 App. Div. 261, 266, 79 N. Y. Supp. 79; Foley v. Foley, 15 App. Div. 276, 44 N. Y. Supp. 588; Cole v. Tyler, 65 N. Y. 73; Cagger v. Lansing, 64 N. Y. 417.

capacity,[15] or where the judgment is entered contrary to a stipulation,[16] or where the judgment does not conform to the verdict, decision, or report on which it is based,[17] the remedy, in the first instance, is by motion and then, if the motion is denied, by appeal.

It is well settled that an order of one special term cannot be reviewed by another special term, but only by an appeal,[18] except where there was no jurisdiction to make the order.[19]

Judicial errors or jurisdictional defects can be corrected by a motion to vacate the judgment or order, or by an appeal.[20] An error of judgment, as distinguished from an error the result of mistake or inadvertence, as to costs, is to be corrected by appeal and not by motion.[21]

Errors committed by a referee on the trial of an issue of fact cannot be corrected on motion by the special term but can be reviewed only by appeal.[22]

If an appeal from an order has been taken, it need not be withdrawn before moving to vacate the order.[23]

—— **Setting verdict aside.** Formal errors in a verdict,[24] or relating to its entry,[25] are to be remedied by a motion to correct the verdict and not by appeal.

—— **Motion for rehearing.** A misunderstanding or mistake in regard to agreements made on the argument of a motion should be corrected by an application for a rehearing.[26]

[15] Beers v. Shannon, 73 N. Y. 292.

[16] Levis v. Burke, 51 Hun, 71 3 N. Y. Supp. 386.

[17] Goodwin v. Schreiber, 86 Hun, 339, 33 N. Y. Supp. 456; Howland v. Howland, 20 Hun, 472; Walbridge v. James, 4 Hun, 793.

[18] Matter of White, 101 App. Div. 172, 91 N. Y. Supp. 513; Corbin v. Casina Land Co., 26 App. Div. 408, 49 N. Y. Supp. 929.

[19] Kamp v. Kamp, 59 N. Y. 212.

[20] Vol. 3, p. 2810.

[21] Norton v. Faucher, 92 Hun, 463, 36 N. Y. Supp. 1032.

[22] Albany Brass & Iron Co. v. Hoffman, 30 App. Div. 76, 51 N. Y. Supp. 779

[23] Belmont v. Erie R. Co., 52 Barb. 637.

[24] Brigg v. Hilton, 99 N. Y. 517.

[25] Rhodes v. Bunts, 21 Wend. 19. See, also, White v. Calder, 35 N. Y. 183.

[26] Herbert v. Smith, 6 Lans. 493.

—— **Motion for new trial.** Where the trial is by jury, a motion for a new trial is necessary to bring up questions of fact for review on an appeal to the appellate division.[27] An appeal from the judgment alone, in such a case, brings up for review only questions of law. The same rule applies where specific questions of fact in an equity case have been submitted to a jury.[28] But if the trial is by the court or a referee, without a jury, questions of fact may be reviewed on appeal from the judgment though no motion for a new trial is made.[29]

§ 2512. Original application to appellate division instead of an appeal.

The appellate division of the supreme court was intended as a substitute for the now abolished general term of the supreme court, and to constitute the branch of the supreme court whose jurisdiction should, in general, be appellate rather than original. Ordinarily the appellate division will not hear motions, in the first instance,[30] but it has "power to vacate or modify, without notice, or on such notice as it shall deem proper, any order in an action or special proceeding made by a justice of the supreme court or by the court without notice to the adverse party; * * * and may grant any order or provisional remedy which has been applied for without notice to the adverse party, and refused by the supreme court or a justice thereof."[31] In short, under this Code provision, an ex parte order may be vacated or modified on an original application to the appellate division, though no appeal is pending; and if an ex parte motion for an order or provisional remedy has been denied, the appellate division may, on an original application, grant the motion. This Code provision has been applied in two comparatively recent cases where an original application was made to modify an order and the relief was granted.[32]

[27] Vol. 3, pp. 2685, 2745.
[28] Vol. 3, p. 2685.
[29] Code Civ. Proc. § 1346, subd. 1.
[30] Vol. 1, p. 165.
[31] Code Civ. Proc. § 1348.
[32] Matter of Tilyou, 57 App. Div. 101, 67 N. Y. Supp. 1097; Marty v. Marty, 66 App. Div. 527, 530, 73 N. Y. Supp. 369.

§ 2513. Nature of right to appeal.

The right of appeal is not a natural or inherent right but rests upon the statute alone, and may be taken away by the legislature unless conferred by the organic law of the state.[33] The power of the legislature to control the remedies so far as they affect existing actions includes the power to extend the time to appeal, or to grant a new right of appeal, provided some time yet remains, according to the law in force when the legislature acted, within which an appeal might be taken.[34] If, however, according to the law existing when the statute extending the time to appeal, or granting a new right of appeal, was passed, the judgment had become final and unalterable, because no further right of appeal existed, then the judgment confers a vested right and is property of which the owner cannot be deprived by an act of the legislature, or otherwise than through due process of law.[35] In short, the right to appeal from a judgment, which has passed through all the appellate courts that have jurisdiction to hear it, cannot be conferred by subsequent legislation.[36]

§ 2514. Appeal as new action or proceeding.

The better rule seems to be that an appeal from a judgment is not to be regarded as a new action or proceeding to enforce the judgment but is simply a proceeding in the action for the correction of errors.[37]

—— **Change of title after taking of appeal.** After an appeal is taken to another court, the name of the appellate court must be substituted for that of the court below, in the title of the action or special proceeding, and in any case the name of the county, if it is mentioned, may be omitted; otherwise the title shall not be changed in consequence of the appeal.[38]

[33] Croveno v. Atlantic Ave. R. Co., 150 N. Y. 225.

[34-36] Germania Sav. Bank v. Suspension Bridge, 159 N. Y. 362, 368.

[37] Boon v. City of Utica, 4 Misc. 583, 25 N. Y. Supp. 846; Pensa v. Pensa, 3 Misc. 417, 23 N. Y. Supp. 186; Miller v. Shall, 67 Barb. 446; Shuler v. Maxwell, 38 Hun, 240. Contra, Pratt v. Allen, 19 How. Pr. 450; Turell v. Erie R. Co., 46 App. Div. 296, 61 N. Y. Supp. 308.

[38] Code Civ. Proc. § 1295.

§ 2515. Payment of costs as condition precedent.

The fact that the costs imposed by an order have not been paid does not preclude an appeal from such order.[39]

§ 2516. Stay of appeal.

An application for a stay of an appeal must be made in the court in which the appeal is pending.[40]

[39] Weehawken Wharf Co. v. Knickerbocker Coal Co., 25 Misc. 309, 54 N. Y. Supp. 566.

[40] Van Orden v. Van Orden, 27 App. Div. 136, 50 N. Y. Supp. 184.

CHAPTER II.

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ART. I. GENERAL RULES.

§ 2517. Statutory provisions making judgment or order final.

The right to appeal, as given by the Code, may be taken away by a special statutory provision applicable to a particular action or a particular special proceeding.[1]

§ 2518. Judgment or order not entered.

A judgment or order which has not been entered is not appealable.[2]

§ 2519. Default judgment or order.

A judgment or order taken by default is not appealable.[3]

§ 2520. Consent judgment or order.

A judgment or order entered by the consent of a party cannot be appealed from by him.[4]

§ 2521. Void judgment or order.

A void judgment or order is appealable notwithstanding that the judgment or order is subject to collateral attack whenever it is set up.[5]

§ 2522. Ex parte order.

An appeal will not lie from an ex parte order but the remedy is by motion to set it aside and then to appeal from the order

[1] See post, § 2556.
[2] See post, § 2598.
[3] See post, § 2570, par. 2.
[4] See post, § 2576.
[5] Fitch v. Devlin, 15 Barb. 47; Gormly v. McIntosh, 22 Barb. 271; Wands v. Robarge, 24 Misc. 273, 53 N. Y. Supp. 700; Catlin v. Rundell, 1 App. Div. 157, 37 N. Y. Supp. 979; Loeb v. Smith, 24 Misc. 22, 52 N. Y. 677. Judgment or order, where void, may be reversed. Allison v. T. A. Snider Preserve Co., 20 Misc. 367, 45 N. Y. Supp. 923.

made on such motion.[6] But an order made after hearing counsel in opposition, though on notice given merely by making the application, is not ex parte.[7]

However, the appellate division, on an original application, has power to vacate or modify, without notice, or on such notice as it deems proper, any ex parte order in an action or special proceeding made by a justice of the supreme court or by the court.[8] So the appellate division may grant any order or provisional remedy which has been applied for, without notice to the adverse party, and refused by the supreme court or a justice thereof.[9]

§ 2523. Part of judgment or order.

An appeal may be taken from a part of a judgment[10] or from a part of an order.[11] provided the portion appealed from is not so inseparably connected with other portions that to reverse as to it would nullify the judgment or order in respects not appealed from.[12] For instance, an appeal ordinarily will not lie from the conditions on which an order is granted,[13] except where the party is entitled to his order without condi-

[6] Brown v. Georgi, 26 Misc. 128, 56 N. Y. Supp. 923; Matter of Reddish, 47 App. Div. 187, 62 N. Y. Supp. 261; Campbell v. Brock's Commercial Agency, 38 App. Div. 137, 56 N. Y. Supp. 540; Aldinger v. Pugh, 57 Hun, 181, 10 N. Y. Supp. 684; Matter of Dunn, 37 State Rep. 802, 14 N. Y. Supp. 14. Ex parte order of surrogate. Matter of Johnson's Estate, 27 Hun, 538. Ex parte order is not, however, a default order. Moyer v. Moyer, 7 App. Div. 523, 533, 40 N. Y. Supp. 258.

[7] People ex rel. Lardner v. Carson, 78 Hun, 544, 29 N. Y. Supp. 619.

[8, 9] Code Civ. Proc. § 1348.

[10] Rule applies also to actions in equity. Cromwell v. Burr, 9 Daly, 482. No appeal can be taken, however, from a referee's determination of only a part of the issues. Applebee v. Duke, 37 State Rep. 446, 13 N. Y. Supp. 929.

[11] McIntyre v. German Sav. Bank, 59 Hun, 536, 20 Civ. Proc. R. (Browne) 209, 13 N. Y. Supp. 674; Matter of New York, L. & W. R. Co., 98 N. Y. 447.

[12] Matter of Rockwell, 31 State Rep. 22, 9 N. Y. Supp. 696. Part of judgment in action at law for a sum of money only cannot be appealed from. Cromwell v. Burr, 9 Daly, 482.

[13] Van Allan v. Gordon, 92 Hun, 500, 36 N. Y. Supp. 987; Tribune

tions, as a matter of right.[14] In other words, an appeal from that part of an order which imposes conditions will be dismissed where the portion of the order appealed from is so connected with the rest of the order that a reversal would result in the absolute denial of the motion, which would be unauthorized.[15]

Where joint wrongdoers are joined as defendants, and the action is severed as to them for the purposes of the trial, the recovery of judgment against one of them, where it is not shown to be paid or satisfied, does not preclude an appeal by the plaintiff from so much of the judgment as dismisses his complaint against the other defendant.[16]

§ 2524. Amended orders.

Where an order is corrected by adding a further recital to correct a deficiency therein, the appeal should be from the original order.[17]

§ 2525. Order where leave to move to renew or vacate is granted.

An appeal cannot be taken from an order after leave to renew the motion is granted,[18] nor where leave to move to vacate is reserved by the order.[19] In such cases the order made on the new motion is to be treated as the final order of the court, and is the only one appealable.

Ass'n v. Smith, 40 Super. Ct. (8 J. & S.) 81; Havemeyer v. Havemeyer, 44 Super Ct. (12 J. & S.) 170.

[14] Wheeler v. Tracy, 47 Super. Ct. (15 J. & S.) 368; Chapin v. Foster, 101 N. Y. 1; O'Brien v. Long, 49 Hun, 80, 1 N. Y. Supp. 695; Van Loan v. Squires, 51 Hun, 360, 4 N. Y. Supp. 371.

[15] Matter of Rockwell, 31 State Rep. 22, 9 N. Y. Supp. 696.

[16] Hurley v. New York & B. Brewing Co., 13 App. Div. 167, 176, 43 N. Y. Supp. 259.

[17] Landers v. Fisher, 24 Hun, 648.

[18] Robbins v. Ferris, 5 Hun, 286.

[19] Wells, Fargo & Co. v. Wellsville, C. & P. C. R. Co., 12 App. Div. 47, 42 N. Y. Supp. 225.

§ 2526. Where only abstract questions involved.

An appeal from a judgment or order will be dismissed where only abstract questions are involved.[20]

§ 2527. Indirect appeal.

The fact that an interlocutory judgment or intermediate order is not directly appealable does not necessarily preclude a review thereof on an appeal from the final judgment in the action or from the final order in a special proceeding.[21] After final judgment, an interlocutory judgment or an intermediate order can be reviewed only on an appeal from the final judgment.[22]

§ 2528. Second appeal.

An appeal from an order does not preclude a subsequent appeal from the judgment entered in the same action, but an appeal cannot be taken from a judgment or order by piecemeal, i. e., separate appeals cannot be taken from different parts of a judgment or order.[23] A fortiori, there is no authority for two concurrent appeals from the same judgment by the same party on the same question.[24] But where, in an action against two or more defendants, whose liabilities are separate and distinct, plaintiff recovers as to part of the defendants but is unsuccessful as to the other defendants, the fact that an affirmance has been had on an appeal by the unsuccessful defendants does not preclude a subsequent appeal by plaintiff from the residue.[25]

Two or more orders may be appealed from together,[26] but the records should be separate.[27]

[20] See post, §§ 2770, 2781.
[21] See post, § 2631.
[22] Bates v. Holbrook, 89 App. Div. 548, 551, 85 N. Y. Supp. 673.
[23] Thompson v. Taylor, 13 Hun, 201.
[24] Abbey v. Wheeler, 170 N. Y. 122.
[25] Genet v. Davenport, 60 N. Y. 194.
[26] Tyler v. Simmons, 6 Paige, 127; Skidmore v. Davis, 10 Paige, 316.
[27] See post, § 2725.

—— **After dismissal of appeal.** The dismissal of an appeal does not ordinarily preclude a second appeal,[28] but where an appeal has been dismissed by the appellate division for failure to print and serve the necessary papers within the time prescribed by the rules of court, a second appeal cannot be taken by a part or all of the appellants, without obtaining leave of court, notwithstanding that the time to appeal has not expired.[29] A second appeal after dismissal of the first with costs will be stayed until the costs of the first are paid.[30]

ART. II. TO COURT OF APPEALS.

(A) GENERAL CONSIDERATIONS.

§ 2529. Historical.

The Constitution of 1894, and the Code amendments enacted in pursuance thereof, made considerable changes in the law as to what judgments and orders are appealable to the court of appeals. Prior thereto nearly all orders were appealable as of right, where not discretionary, but in certain actions the right to appeal from judgments was dependent on the amount involved. The Constitution and Code amendments changed all this by limiting the right to appeal from orders as of right to orders granting a new trial on exceptions, and by striking out the limitation as to the amount involved. The Constitution now provides that "the legislature may further restrict the jurisdiction of the court of appeals and the right of appeal thereto, but the right of appeal shall not depend on the amount involved." [31]

§ 2530. Code provision.

An appeal may be taken to the court of appeals in a case where that court has jurisdiction, as prescribed in sections 190

[28] French v. Row, 77 Hun, 380, 28 N. Y. Supp. 849; Culliford v. Gadd, 135 N. Y. 632.

[29] Sperling v. Boll, 26 App. Div. 64, 50 N. Y. Supp. 209.

[30] Dresser v. Brooks, 1 Abb. Dec. 555.

[31] Const. art. 6, § 9.

and 191 of the Code.[82] Sections 190 and 191 of the Code, in so far as they relate to the right of appeal, may be tabulated as follows:

1. Appeals of right, subject to exceptions found in section 191 of the Code.	1. Final judgment. 2. Final order in a special proceeding. 3. Order granting new trial on exceptions.
2. Appeals by leave of appellate division.	1. From judgment or order, in any case, where questions are certified as allowed by Code Civ. Proc. § 190, subd. 2. 2. From judgment in actions commenced in court other than supreme, county or surrogate's court or court of claims (Code Civ. Proc. § 191, subd. 1). 3. From judgment in particular actions where appellate division affirms unanimously (Code Civ. Proc. § 191, subd. 2).
3. Appeals by leave of judge of court of appeals.	In cases under subdivision three, *supra*, where appellate division refuses to allow appeal.

Subject to the exceptions set forth in section 191 of the Code, "appeals may be taken as of right" to the court of appeals "from judgments or orders finally determining actions or special proceedings."[83] There can be no such thing as an order finally determining an action, and hence the word "order" as used refers only to an order finally determining a special proceeding. Hence, no order in an "action" is appealable as of right to the court of appeals except an order granting a new trial on exceptions.[84]

[82] Code Civ. Proc. § 1324.

[83] Code Civ. Proc. § 190.

[84] Van Arsdale v. King, 155 N. Y. 325. "There may be, in practice or in the progress of the cause, such a thing as an order which may or may not have the effect of ending the case in the sense that one party or the other can go no farther, but such an order determines no controversy or any action in the sense contemplated by the Constitution and the Code." Id.

§ 2531. Right as limited by statute.

When a party seeks to have a judgment or order reviewed in the court of appeals, he must be able to point to some statute giving him the right and conferring the jurisdiction.[35] Where the right of appeal is given in express terms, the burden is on the respondent to show that the appeal is within any of the limitations of the statute contained in section 191 of the Code.[36]

That a statute may preclude an appeal to the court of appeals from a judgment or order otherwise appealable will be noticed in another connection.[37]

—— **Restriction of right.** The legislature may further deny or restrict the right of appeal to the court of appeals in any class or classes of actions, in its discretion, the only restriction on the legislative power being that the right shall not be made to depend on the amount involved.[38]

—— **Enlargement of right.** The legislature may enlarge the jurisdiction of the court of appeals.[39]

§ 2532. "Actual determinations" of appellate division.

The Code limitation of the jurisdiction of the court of appeals to the review of "actual determinations" of the appellate division,[40] precludes the review of a judgment or order entered by consent,[41] or a judgment entered in the trial court pro forma pursuant to stipulation, merely to bring an appeal to the court of appeals,[42] but does not preclude an appeal where the respondent makes default in the appellate division where such court nevertheless considers the merits and affirms the trial

[35] Bryant v. Thompson, 128 N. Y. 426, 434; Croveno v. Atlantic Ave. R. Co., 150 N. Y. 225, 228; Matter of Jones, 181 N. Y. 389.

[36] Laidlaw v. Sage, 158 N. Y. 73, 87; Kaplan v. New York Biscuit Co., 151 N. Y. 171.

[37] See post, § 2556.

[38] Sciolina v. Erie Preserving Co., 151 N. Y. 50, 52.

[39] People ex rel. Commissioners of Charities v. Cullen, 153 N. Y. 629.

[40] Code Civ. Proc. § 190.

[41] Peterson v. Swan, 119 N. Y. 662.

[42] Gridley v. Daggett, 6 How. Pr. 280.

court.[43] This rule has been also applied by holding that where a judgment entered on an order of the appellate division does not conform to that order, the proper remedy is by motion in the court below to correct the judgment and not by appeal to the court of appeals in the first instance.[44]

§ 2533. Consent as conferring jurisdiction.

If a judgment or order is not appealable to the court of appeals as of right, and leave to appeal is not obtained, jurisdiction cannot be conferred by a stipulation of the parties.[44a]

§ 2534. Whether judgment or order must be appealed from.

If the appellate division affirms, the appeal must be from the judgment entered on the order of affirmance and not from the order of affirmance;[45] but if the appellate division reverses and grants a new trial, the appeal must be from the order and not from the judgment entered thereon.[46] For instance, an appeal cannot be taken from an order of the appellate division reversing an order granting a new trial because of newly-discovered evidence, and affirming the judgment of the trial court, but the appeal must be from the judgment entered on such order.[47] So a question certified by the appellate division cannot be considered where the appeal is from the order of affirmance of the appellate division instead of from the judgment entered on such order.[48]

(B) AS MATTER OF RIGHT.

§ 2535. Enumeration.

Subject to the exceptions contained in section 191 of the Code, an appeal may be taken to the court of appeals, as a matter of right, in only the three following cases, viz: (1) ap-

[43] Seneca Nation of Indians v. Knight, 19 N. Y. 587.
[44] Hackett v. Belden, 47 N. Y. 624.
[44a] Hoes v. Edison General Electric Co., 150 N. Y. 87.
[45] See post, § 2536.
[46-48] Code Civ. Proc. § 1318.

peal from a final judgment; (2) appeal from a final order in a special proceeding; and (3) appeal from an order granting a new trial on exceptions where a stipulation for judgment absolute in case of affirmance is given.[49]

§ 2536. Final judgments.

Subject to the exceptions contained in section 191 of the Code, an appeal may be taken to the court of appeals, as a matter of right, from a final judgment in an action.[50] In a preceding volume, the difference between a final and an interlocutory judgment has been considered.[51] Where a judgment fully and completely disposes of the substantial rights of the parties at issue under the pleadings, and by the force of its own provisions may conclude the appellant without the entry of a further judgment, it must be deemed a final judgment, although in a certain contingency dependent on the action of the appellant, it provides for the taking and stating of an account before a referee, and the payment of the amount found due as a condition precedent to the enjoyment of certain rights accorded him therein.[52] That a judgment has been called, during the litigation, an interlocutory one, is not absolutely controlling as to its nature.[53]

A judgment of the appellate division reversing an interlocutory judgment overruling a demurrer to the complaint and sustaining such demurrer, and directing a final judgment unless the plaintiff amend within a specified time, does not, when perfected by the entry of a final judgment dismissing the complaint on the failure to amend, become a final determination so as to be appealable to the court of appeals.[54]

[49] Const. art. 6, § 9; Code Civ. Proc. § 190.
[50] Code Civ. Proc. § 190, subd. 1.
[51] Vol. 3. pp. 2752-2754.
[52] Moulton v. Cornish, 138 N. Y. 133, 147.
[53] Breed v. Ruoff, 173 N. Y. 340, 342.
[54] Abbey v. Wheeler, 170 N. Y. 122, which also held that an appeal from the judgment of the appellate division which affirmed the final judgment dismissing the complaint was proper.

A judgment entered on the report of a referee, directing a final accounting of the affairs of a dissolved corporation by the trustees thereof and for such sums as may be found due by them from the sale of goods to any one or more of themselves, and for sums improperly paid to them for services in the performance of their trust, and that the plaintiff have judgment with costs, is not final, but interlocutory, since something remains to be done in order to determine the liability of the defendants.[55] In the case last cited, it was urged that inasmuch as the judgment contained a provision that the plaintiff recover the costs, which were taxed, and have execution therefor, the judgment for costs was final and stamped the case with the character of a final judgment. The court, in answering such contention, speaks as follows: "Nearly all interlocutory judgments are substantially final in many respects. That is to say, certain things are decided that must ultimately prevail upon the entry of final judgment, so that the mere fact that in the referee's report some things are final and other things are merely interlocutory does not change the character of the judgment and make it final in the sense that this court has power to review it."

A judgment which decrees that two of several defendants are jointly and severally indebted to a decedent's estate in a certain sum and that judgment be docketed therefor, appoints a receiver to collect such sum by suit or otherwise and to deposit and hold the same subject to the further order of the court, and provides that all parties to the action interested in the estate may apply for final judgment on the report of the receiver and upon further proof as they may be advised, is interlocutory.

A judgment in a foreclosure suit brought by the receiver of a building and loan association, which orders the foreclosure and sale to be postponed until the sum due defendants is finally ascertained on the accounting of the receiver and that a judgment be entered for the ascertainment of that amount as soon

[55] Osborn v. Cardeza, 180 N. Y. 69. Compare, as contra, Bergen v. Carman, 79 N. Y. 146, 151.

as the assets of the association are sufficiently liquidated for the purpose, is a final judgment.[66-67]

One who has appealed on the theory that a judgment was final cannot thereafter deny the finality thereof.[68]

—— **Appeal from "order" of appellate division.** The appeal to the court of appeals must be from the judgment entered on the order of the appellate division and cannot be from the order of the appellate division.[69] This applies equally well whether the order is one of affirmance [70] or one of reversal without granting a new trial,[71] or one of dismissal. No appeal can be taken to the court of appeals from an "order" of the appellate division dismissing an appeal from the judgment below, but the proper practice is to enter a judgment of dismissal upon the order and then appeal from such judgment.[72] But if there is a reversal of the judgment and a new trial granted, the appeal should be from the order granting a new trial which authorizes a review of the judgment of reversal. In such a case, the judgment of reversal is not appealable.[73] A reversal with an award of a new trial is not a "final" "judgment" so as to be appealable as a judgment.[74]

§ 2537. Interlocutory judgments.

An appeal cannot be taken to the court of appeals, as of right, from an interlocutory judgment,[75] since it is the policy

[66-67] Breed v. Ruoff, 173 N. Y. 340.

[68] Sperry v. Hellman, 2 Misc. 414, 21 N. Y. Supp. 1014.

[69] Croveno v. Atlantic Ave. R. Co., 150 N. Y. 225, 228; Bieling v. City of Brooklyn, 120 N. Y. 98.

[70] Derleth v. De Graff, 104 N. Y. 661; Kilmer v. Bradley, 80 N. Y. 630. Question certified cannot be considered where appeal is from order of affirmance instead of from the judgment entered on such order. Reiss v. Town of Pelham, 170 N. Y. 54, 58. So an appeal cannot be taken from an order of the appellate division reversing an order granting a new trial and affirming the judgment but the appeal must be from the judgment entered on such order. Id.

[71] Rust v. Hauselt, 69 N. Y. 485; Mehl v. Vonderwulbeke, 46 N. Y. 539.

[72] Stevens v. Central Nat. Bank, 162 N. Y. 253.

[73] Code Civ. Proc. § 1318; Pharis v. Gere, 112 N. Y. 408.

[74] Duane v. Northern R. Co., 3 N. Y. (3 Comst.) 545.

[75] Victory v. Blood, 93 N. Y. 650; Tilton v. Vail, 117 N. Y. 520; Walker v. Spencer, 86 N. Y. 162, 167; Beebe v. Griffing, 6 N. Y. (2 Seld.) 465.

of the Code to allow but one appeal to the court of appeals in the same cause. But while an interlocutory judgment is not appealable to the court of appeals, yet the party aggrieved may, after the entry of the judgment, move before the appellate division for a new trial on exceptions, and then appeal from the order if it refuses a new trial.[76] And where final judgment is rendered in the court below, after the affirmance of an interlocutory judgment by the appellate division, or after the refusal by the appellate division of a new trial either on an application to it in the first instance or on an appeal from an order of the special term or of the judge before whom the issues or questions of fact were tried by a jury, the party aggrieved may appeal directly from the final judgment to the court of appeals, notwithstanding that it was rendered at a special term or at a trial term or pursuant to the directions contained in a referee's report.[77] But such an appeal brings up for review only the determination of the appellate division affirming the interlocutory judgment or refusing a new trial.[78]

Where final judgment is entered in the trial court after the affirmance by the appellate division of an interlocutory judgment, or after a refusal by the appellate division of a new trial on an original application or on appeal from an order made on a motion for a new trial, and an appeal is taken to the appellate division from the final judgment, and thereafter an appeal from the determination of the appellate division on the appeal from the final judgment is taken to the court of appeals, the determination of the appellate division affirming the interlocutory judgment or refusing the new trial may be brought up for review by the appellant by specifying it in the notice of appeal or by the respondent by taking a cross-appeal therefrom.[79]

§ 2538. Final order in special proceedings.

An appeal may be taken as of right from a final order in a

[76] Raynor v. Raynor, 94 N. Y. 248.

[77] Code Civ. Proc. § 1336. See, also, Raynor v. Raynor, 94 N. Y. 248; Weeks v. Cornwell, 21 Wkly. Dig. 208.

[78] Code Civ. Proc. § 1336.

[79] Code Civ. Proc. § 1350, in substance. Cross-appeal by respondent

special proceeding,[80] except where the special proceeding was commenced in a court other than the supreme court, the court of claims, a county court, or a surrogate's court,[81] or where the statute governing the special proceeding expressly restricts an appeal to the court of appeals.[82] In the former case, an appeal is not permissible unless leave to appeal is obtained, while in the latter case an appeal does not lie even by leave of court.

—— **What is a special proceeding.** The first question which arises is as to what is a special proceeding. This question has been considered in detail in a preceding volume [83] and will not be further noticed except by digesting the late cases in the note below.[84]

is proper though his time to take an original appeal therefrom has expired. Id.

[80] Code Civ. Proc. § 190, subd. 1.

[81] Code Civ. Proc. § 191, subd. 1. In such a case, leave to appeal must be obtained.

[82] People ex rel. Feeny v. Richmond County Canvassers, 156 N. Y. 36, 48, which held an order in an election contest was appealable. If statute makes decision of appellate division final, no appeal lies to the court of appeals. Matter of Delaware & Hudson Canal Co., 69 N. Y. 209.

[83] Volume 1, pp. 12–18.

[84] Proceedings under section 66 of the Code to determine and enforce the lien of an attorney are special proceedings. Matter of King, 168 N. Y. 53. So is an application to compel a purchaser at a judicial sale to take title and that of a purchaser to be relieved from his bid. Parish v. Parish, 175 N. Y. 181. So are proceedings under section 915 of the Code relating to obtaining testimony for use in another state. Matter of Strong, 177 N. Y. 400. So are proceedings by taxpayers under section three of the General Municipal Law to investigate the financial affairs of a village. Matter of Taxpayers & Freeholders of the Village of Plattsburgh, 157 N. Y. 78. So are proceedings for judicial settlement of executor's accounts. Matter of Small, 158 N. Y. 128; Matter of Prentice, 160 N. Y. 569; Matter of Regan, 167 N. Y. 338. So are election contest proceedings. People ex rel. Feeny v. Board of Canvassers, 156 N. Y. 36. So are procedings under the General Assignment Act. Matter of Talmage, 160 N. Y. 512. Condemnation proceedings are special proceedings. Matter of Southern Boulevard R. Co., 128 N. Y. 93. Semble, a proceeding instituted in pursuance of the provisions of the judgment in an action to sequester the income of a trust fund is a special proceeding. Wetmore v. Wetmore, 162 N. Y. 503, 508. Proceedings to assess the damages suffered by reason of an injunction are not special proceedings. Keator v. Dalton, 171 N. Y. 650.

—— **What is the "final" order.** The second question is as to what is a "final" order in a special proceeding. The term has not been judicially defined. The final order corresponds to the final judgment in an action. It is not necessarily the last order in the proceeding though there cannot be more than one final order. The final order may be defined as the order in the proceeding which judicially determines the merits of the proceeding. A special term order which modifies and corrects a final order in a special proceeding thereby becomes the "final" order in that proceeding, so that an order of the appellate division reversing it is appealable.[85] An order in a proceeding instituted by a property owner to review an assessment levied for a local improvement, which sets aside the assessment not only as to him but as to all the other property owners, is a final order.[86] An order settling an executor's account may be a final order though the accounting is an intermediate one in the sense that the estate is not finally distributed.[87] The following orders have been held to be not final: An order denying a motion to set aside a decree, or to open it, for the purpose of correcting errors or to compel a further accounting;[88] an order adjudging a party guilty of contempt in disobeying a judgment, and imposing a fine, which also provides for a reference to take proof and report as to the damages sustained by plaintiff by the acts of defendant;[89] an order directing the resumption of certain payments by the guardian of an infant's property to the guardian of his person;[90] an order directing a witness to answer specified questions, on an examination under a commission for use as evidence in another state.[91]

An order of the appellate division which takes the place of a final order in a special proceeding is such a final order.[92] An order reversing an order is final notwithstanding the matter

[85] Matter of Board of Education, 169 N. Y. 456, 460.
[86] Matter of Munn, 165 N. Y. 149, 158.
[87] Matter of Prentice, 160 N. Y. 569.
[88] Matter of Small, 158 N. Y. 128.
[89] Ray v. New York Bay Extension R. Co., 155 N. Y. 102.
[90] Matter of White, 95 App. Div. 104, 88 N. Y. Supp. 564.
[91] Matter of Strong, 177 N. Y. 400.
[92] Matter of Hulbert Bros. & Co., 160 N. Y. 9, 15.

is remanded for further proceedings, where the statute authorizes no further proceedings.[93] An order of the appellate division punishing a witness for contempt in refusing to answer questions, on an examination to obtain a discovery concerning property belonging to the estate of a deceased person, is a final order.[94] So is an order reversing an order of the special term granting an application to compel the delivery of books and papers to a public officer, and which denies the application.[95] Likewise, an order reversing an order appointing a referee to ascertain and report the value of the petitioner's services in a proceeding to enforce an attorney's lien and which "denies the application" is a final order.[96] But an order reversing an order denying a motion to compel an executor to account, and remitting the proceedings to the surrogate for an accounting, is not a final order,[97] nor is an order of the appellate division reversing an order quashing a writ of certiorari but reinstating the writ and remitting the proceedings to the lower court for a determination on the merits.[98]

An order in condemnation proceedings which merely reverses the former, and orders a new appraisal is not a "final" order in a special proceeding,[99] nor is an order affirming an order appointing commissioners to ascertain the damages accruing from the change of the grade of a street.[100] But while an order reversing an order of the special term vacating a final order and judgment in condemnation proceedings is not a final order,[101] yet where the appellate division not only reverses the order and judgment of condemnation but also dismisses the proceeding, the order entered on the decision is final.[102]

[93] People ex rel. New York & H. R. R. R. Co. v. Commissioners of Taxes, 101 N. Y. 322.
[94] Matter of King v. Ashley, 179 N. Y. 281.
[95] Matter of Brenner, 170 N. Y. 185.
[96] Matter of King, 168 N. Y. 53, 60.
[97] Matter of Latz, 110 N. Y. 661.
[98] People ex rel. Bronx Gas & Elec. Co. v. Baker, 155 N. Y. 308.
[99] Matter of Southern Boulevard R. Co., 128 N. Y. 93, 97.
[100] Matter of Grab, 157 N. Y. 69.
[101] City of Johnstown v. Wade, 157 N. Y. 50.
[102] Village of Champlain v. McCrea, 165 N. Y. 264, 269.

An order affirming, with modifications as to the priority of payment of claims and as to commissions and costs, an order confirming the report of a referee in a proceeding for the settlement of an assignee's account, allowing the account, adjusting the claims of creditors and directing payment thereupon, relieving the assignee from liability for all matters included in his account, and releasing his sureties to that extent, is a final order, notwithstanding the proceeding was intermediate in the sense that the assigned estate was not then ready for final distribution.[103]

An order requiring the board of railroad commissioners to issue a certificate of public convenience to petitioner is a final order in a special proceeding so as to be appealable as of right.[104]

§ 2539. Order granting new trial on exceptions.

An appeal may be taken as of right from an order "granting" a new trial "on exceptions," where the appellant stipulates that on affirmance judgment absolute shall be rendered against him,[105] subject to the limitations contained in section 191 of the Code. Note, however, that the appeal as of right can only be taken from an order "granting" a new trial, and then only where the new trial is granted "on exceptions."[106] An order granting a new trial on the facts, "in a case tried before a jury," is not an order granting a new trial on exceptions.[107]

The requiring a stipulation for judgment absolute was in-

[103] Matter of Talmage, 160 N. Y. 512, 515.

[104] Matter of Wood, 181 N. Y. 93.

[105] Code Civ. Proc. § 190, subd. 1. Judgment to be entered on stipulation, on affirmance, see post, § 2833.

[106] Allen v. Corn Exchange Bank, 181 N. Y. 278. It follows that where the appellate division, on an appeal from a judgment and from an order denying a new trial, reverses and grants a new trial without stating in the order of reversal whether the reversal is on the law or on the facts, no appeal as of right lies to the court of appeals. Henavie v. New York Cent. & H. R. R. Co., 154 N. Y. 278.

[107] Allen v. Corn Exchange Bank, 181 N. Y. 278.

tended to meet that class of cases in which a new trial can only be a useless expense because the whole merits are presented and disposed of by the order awarding a new trial.[108] It is not advisable to give the stipulation, so as to be entitled to appeal, unless the objections and exceptions taken at the trial cannot be obviated on a second trial,[109] since, where a stipulation is given, the appellant takes the risk of every exception appearing on the record, and the respondent may sustain the order by showing any legal error on the part of the trial court.[110]

There is authority for the proposition that an appeal from an order granting a new trial on exceptions is not a matter of right in every case where the stipulation is given. Such holding is based on the ground that inasmuch as a stipulation is always necessary, it follows that no appeal lies from such an order where the stipulation, if given, would be ineffective.[111]

To obtain a review of an order in an action other than an order granting a new trial on exceptions, or a nonfinal order in a special proceeding, the proper practice is to obtain leave as provided for by Code Civ. Proc. § 190, subd. 2, which provides that "appeals may also be taken from determinations of the appellate division of the supreme court in any department, where the appellate division allows the same, and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, in which case the appeal brings up for review the question or questions so certified, and no other; and the court of appeals shall certify to the appellate division its determination on such questions." [112-115]

[108] Lanman v. Lewiston R. Co., 18 N. Y. 493.

[109] See Cobb v. Hatfield, 46 N. Y. 533, 538.

[110] Foster v. Bookwalter, 152 N. Y. 166, 168, and cases cited.

[111] So held in quo warranto suit to oust defendant from office and to establish the rights of the relator. People ex rel. Judson v. Thacher, 55 N. Y. 525, 537.

[112-115] Order affirming order denying motion to set aside an assessment of damages after remittitur from court of appeals is reviewable where leave to appeal is granted and it is certified that questions of law have arisen which ought to be reviewed. City Trust, Safe Deposit & Surety Co. v. American Brewing Co., 182 N. Y. 285.

—— **Necessity for stipulation.** If the stipulation for judgment absolute is not given, the appeal from the order should be dismissed.[116] The stipulation is necessary though the appellate division has granted leave to appeal and certified a question of law for review.[117] It has been held, however, that when an appeal is taken from a provision inserted in an order granting a new trial which the court had no authority to make because the question so decided was not presented by the record, the stipulation need not be given.[118]

The stipulation should accompany the notice of appeal.

—— **Estoppel to object to want of stipulation.** Appearance in the appellate court and submitting the appeal to its jurisdiction does not estop the respondent from raising the objection that there was no stipulation.[119]

—— **Relief from stipulation.** Where appellant, before the decision, is given an opportunity to withdraw his stipulation and proceed to a new trial, which he declines to do, he will not, after the case has been decided adversely to him, be relieved from his stipulation;[120] but, before the decision, appellant may be granted leave to withdraw the appeal on payment of costs if he has acted in good faith.[121]

(C) BY LEAVE OF COURT.

§ 2540. Constitutional and Code provisions.

After enumerating the judgments and orders appealable as of right to the court of appeals, the Constitution provides that "the appellate division in any department may, however, allow an appeal on any question of law which, in its opinion, ought

[116] Matter of Valentine's Estate, 136 N. Y. 623; Lane v. Wheeler, 101 N. Y. 17.

[117] Mundt v. Glokner, 160 N. Y. 571, followed in New York Cent. & H. R. R. Co. v. State, 166 N. Y. 286.

[118] Beman v. Todd, 124 N. Y. 114.

[119] Wilmore v. Flack, 96 N. Y. 512.

[120] Williams v. Lindblom, 143 N. Y. 675.

[121] Mackay v. Lewis, 73 N. Y. 382.

to be reviewed by the court of appeals." [122] Section 190 of the Code, subdivision 2, provides for an appeal, by leave of the appellate division, from an interlocutory judgment or from an order other than a final order in a special proceeding. Section 191 of the Code, subdivisions 1 and 2, provides for an appeal, by leave of court, (1) from a final judgment or a final order in a special proceeding, where the action is commenced in an inferior court, and (2) from a final judgment in particular actions where the appellate division unanimously affirms. In short, section 190 permits appeals, by leave, from any judgment or order, while section 191 restricts appeals as of right by providing that, in certain instances, a final judgment or a final order in a special proceeding is not appealable except by leave of court. Under section 190, questions must be certified and the review is limited to answering such questions. Under section 191, particular questions need not be certified and the review is not limited. Under section 190, leave can only be granted by the appellate division, while under section 191, subdivision 2, leave may be granted by a judge of the court of appeals if the appellate division refuses leave.

§ 2541. Appeal from interlocutory judgment or nonappealable order.

Appeals, as of right, to the court of appeals, being limited to appeals from final judgments, final orders in special proceedings, and orders granting new trials on exceptions, it follows that the only way to directly appeal from an interlocutory judgment or orders in an action, except orders granting new trials on exceptions, is by leave of court, under section 190 of the Code, on certified questions.

Leave to appeal, pursuant to this section, is a nullity where an appeal can be taken as a matter of right,[122a] as where the appeal is from an order granting a new trial on exceptions and leave to appeal is sought to escape the giving of a stipulation for judgment absolute.

[122] Const. art. 6, § 9.
[122a] See ante, § 2539.

—— **Form and contents of questions certified.** "A question so certified should be a distinct point or proposition of law, clearly stated, so that it can be definitely answered without regard to other issues in the case, and should be a question of law only."[123] "If the question is stated in such broad and indefinite terms that it will admit of one answer under one set of circumstances and a different answer under another, or if it presents merely an abstract proposition,[124] and no facts are disclosed in the record which show that it arose in the case,[125] the court should decline to answer it."[126] The special questions so certified must be so framed that the answers will determine the particular controversy involved in the appeal, and not merely a part of it.[127] The question or questions certified must not only have been before the trial court for its determination,[128] but also have actually arisen and been determined by the appellate division.[129] Questions of law cannot be certified where the determination of the appellate division rests wholly on a question of fact.[130]

—— **Questions brought up for review.** Only the questions certified are brought up for review.[131] And not only is the court of appeals confined to the questions certified, but it is its duty to examine the record not only to see that they actually

[123] Grannan v. Westchester Racing Ass'n, 153 N. Y. 449, 458. Questions of fact cannot be certified. Matter of Westerfield, 163 N. Y. 209. Each question certified should be separately stated so that it can be answered yes or no. Devlin v. Hinman, 161 N. Y. 115.

[124] Abstract questions should not be certified as they will not be answered. Matter of Davies, 168 N. Y. 89, 110.

[125] Question must be raised by the record. Matter of Robinson, 160 N. Y. 448.

[126] Grannan v. Westchester Racing Ass'n, 153 N. Y. 449, 458.

[127] Blaschko v. Wurster, 156 N. Y. 437, 445.

[128] Matter of Coatsworth, 160 N. Y. 114, 123.

[129] Schenck v. Barnes, 156 N. Y. 316, 323; Coatsworth v. Lehigh Valley R. Co., 156 N. Y. 451, 458.

[130] Matter of Brooklyn Union El. R. Co., 99 App. Div. 625, 91 N. Y. Supp. 158.

[131] Grannan v. Westchester Racing Ass'n, 153 N. Y. 449. The court of appeals has no power to proceed further. Davis v. Cornue, 151 N. Y. 172.

arose, but also to see how they arose, so that the questions can be decided as they were presented to the court below.[182] Ordinarily the opinion of the appellate division cannot be referred to; but if the order certifying the questions expressly refers to such opinion, it can be resorted to as a part of the record of the appellate division for the purpose of ascertaining the ground of the decision appealed from.[183]

The provision of the Constitution,[183a] and the Code subdivision enacted in pursuance thereof, now being considered, were not intended to nullify or affect the provision which prevents the court of appeals from reviewing questions as to the sufficiency of the evidence where the decision of the appellate division is unanimous.[183b]

——**Judgment or order from which appeal to be taken.** Where a question is certified, the appeal may be from the interlocutory judgment or order which decided the question, though such order or judgment is not reviewable except as to the certified question.[184]

§ 2542. Appeal in action commenced in inferior court.

If the action or special proceeding is commenced in any court other than the supreme court, court of claims, county court, or a surrogate's court, no appeal can be taken to the court of appeals unless the appellate division grants leave to appeal.[185] This Code subdivision is not expressly confined to "final judgments" and "final orders" in the actions and proceedings mentioned, but it is submitted that it applies only to such judgments and orders granting a new trial on exceptions, i. e., where an appeal is a matter of right, so that if the appeal is from an order in an action other than an order granting a

[182] Baxter v. McDonnell, 154 N. Y. 435.

[183] Pringle v. Long Island R. Co., 157 N. Y. 100.

[183a] Const. art. 6, § 9.

[183b] Reed v. McCord, 160 N. Y. 330. Followed in Kleiner v. Third Ave. R. Co., 162 N. Y. 193, 198.

[184] Bank of Metropolis v. Faber, 150 N. Y. 200, 209.

[185] Code Civ. Proc. § 191, subd. 1. The leave to appeal is general and no questions are to be certified.

new trial on exceptions, an interlocutory judgment, or a non-final order in a special proceeding, in an action or proceeding commenced in an inferior court, the leave to appeal is not governed by this subdivision but by subdivision 2 of section 190 so that specific questions must be certified for review. This Code section precludes an appeal, as of right, from a judgment in an action originally commenced in a justice court but transferred to the supreme court on a plea of title being interposed.[136]

§ 2543. Appeal in particular actions where appellate division unanimously affirms.

In a certain class of actions, a judgment of affirmance cannot be appealed from when the decision of the appellate division is unanimous, unless such appellate division certifies that, in its opinion, a question of law is involved which ought to be reviewed by the court of appeals, or unless, in case of its refusal to so certify, an appeal is allowed by a judge of the court of appeals.[137] The class of actions selected by the legislature, in the exercise of its power to restrict appeals, embraces those actions in which the law has been well settled for so long a period as to make a further appeal unnecessary, except in rare instances involving new questions, when permission to appeal can readily be obtained.[138] The actions enumerated in the Code in which a unanimous affirmance precludes an appeal from the judgment to the court of appeals, except by leave of court, are as follows:

1. Actions to recover damages for a personal injury.[139]
2. Actions to recover damages for injuries resulting in death.

[136] Sidwell v. Greig, 157 N. Y. 30.

[137] Code Civ. Proc. § 191, subd. 2.

[138] Boyd v. Gorman, 157 N. Y. 365.

[139] What are actions for personal injury, see Code Civ. Proc. § 3343, subd. 9; vol. 1, p. 481; vol. 2, pp. 1279, 1393, 2066. Action to recover damages for malicious prosecution is action for personal injury, within this Code provision. Parr v. Loder, 180 N. Y. 531.

3. Actions to set aside a judgment, sale, transfer, conveyance, assignment or written instrument as in fraud of the rights of creditors.

4. Actions to recover wages, salary, or compensation for services, including expenses incidental thereto, or damages for breach of any contract therefor.[140] An action for materials furnished and services rendered pursuant to a written agreement in decorating and painting a building is not an action for wages or services, within this Code provision.[141] Nor does it apply to actions to recover salaries where the compensation is determined by statute as an incident to a public office.[142] But the Code provision is not limited to actions to recover the claims of employes and laboring men employed under a given rate of wages or at a given salary or rate of compensation, but is sufficiently broad to cover actions on a quantum meruit for services rendered by a professional man.[143]

—— **What is a judgment of affirmance.** No difficulty has been experienced in determining what is a judgment of affirmance. A judgment entered on an order of the appellate division overruling exceptions directed to be heard by it in the first instance and denying the motion for a new trial based thereon, and ordering judgment on the verdict, is a judgment of affirmance.[144]

—— **What is a "unanimous" affirmance.** A unanimous affirmance means an affirmance by all the justices of the appellate division who hear the appeal,[145] though it is held that where one of them who sits, dies,[146] or is appointed to the court of appeals,[147] before the decision, and takes no part in it, a concurrence by the remaining justices is a unanimous affirmance. But

[140] This clause was added by amendment in 1898.

[141] Beady v. Rothschild, 170 N. Y. 574 (mem).

[142] Donnelly v. City of New York, 54 App. Div. 155, 66 N. Y. Supp. 411.

[143] Boyd v. Gorman, 157 N. Y. 365.

[144] Huda v. American Glucose Co., 151 N. Y. 549.

[145] If only four justices sit and all concur, the affirmance is unanimous. Harroun v. Brush Electric Light Co., 152 N. Y. 212.

[146] McDonnell v. New York Cent. & H. R. R. Co., 159 N. Y. 524

[147] Wittleder v. Citizens' Elec. Illuminating Co., 47 App. Div. 543, 62 N. Y. Supp. 488.

where one of the justices sat but did not vote and the remaining four justices concurred in affirmance, it is not a unanimous affirmance.[148]

In the absence of anything in the record to show that the decision of the appellate division was unanimous, the court of appeals will treat it as otherwise.[149] The burden of showing that a judgment of affirmance was unanimous is on the party so claiming, and recourse cannot be had to the opinion but the fact must be established either by the judgment or by a certificate of the court appearing in the record.[150]

ART. III. TO APPELLATE DIVISION.

(A) FROM SUPREME COURT.

1. Judgments.

§ 2544. Final judgments.

A final judgment of the supreme court is appealable to the appellate division.[151] What is a final judgment has already been considered.[152] In no case where an appeal is taken to the special term, can a further appeal be taken to the appellate division.[153] Where an interlocutory judgment entered on overruling a demurrer is reversed by the appellate division which sustains the demurrer and grants leave to plead over within a specified time, and thereafter, on the failure to plead over, a final judgment is entered dismissing the complaint and awarding costs, such final judgment is appealable to the appellate division as if it was a judgment of the special term.[154]

[148] Warn v. New York Cent. & H. R. R. Co., 163 N. Y. 525.
[149] Matter of Marcellus, 165 N. Y. 70, 75.
[150] Kaplan v. New York Biscuit Co., 151 N. Y. 171; Laidlaw v. Sage, 158 N. Y. 73, 86.
[151] Code Civ. Proc. § 1346.
[152] Volume 3, pp. 2752–2754 and ante, § 2536.
[153] Boechat v. Brown, 9 App. Div. 369, 41 N. Y. Supp. 467.
[154] Abbey v. Wheeler, 58 App. Div. 451, 69 N. Y. Supp. 432.

§ 2545. Interlocutory judgments.

Prior to the present Code, an interlocutory judgment was not appealable, the only remedy being by a motion for a new trial. This rule still prevails as to appeals to the court of appeals but the Code now expressly provides that "an appeal may be taken from an interlocutory judgment rendered at a special, or trial, term of the supreme court, or entered on the report of a referee."[155] The alternative remedy by a motion for a new trial at the appellate division, on exceptions, is confined to trials of an issue of "fact,"[156] and hence the only way to directly review an interlocutory judgment entered after a decision on a demurrer is either to directly appeal therefrom or to specify it in the notice of appeal from the final judgment. An "order" or "decision" overruling or sustaining a demurrer is not appealable,[157] since the appeal must be taken from the interlocutory judgment entered on the order or decision.[158]

§ 2546. Judgment or order entered on decision of appellate term on appeal from the city court.

An appeal to the appellate division of the supreme court in the first judicial department may be taken from the judgment or order entered on the determination of an appeal to the appellate term from the city court of New York, provided that leave to appeal be obtained,[159] and, if the appeal is from an order granting a new trial on a case or exeception, that appellant file a stipulation for judgment absolute with his application for leave to appeal.

[155] Code Civ. Proc. § 1349.

[156] Code Civ. Proc. § 1001.

[157] Brown v. Leary, 100 App. Div. 421, 91 N. Y. Supp. 463; Unckles v. Hentz, 19 App. Div. 165, 45 N. Y. Supp. 894 Mooney v. Byrne, 1 App. Div. 316, 37 N. Y. Supp. 388; Kley v. Higgins, 59 App. Div. 581, 69 N. Y. 826; Gabay v. Doane, 66 App. Div. 507, 73 N. Y. Supp. 381.

[158] Olin v. Arendt, 35 App. Div. 529, 54 N. Y. Supp. 820; Spies v. Munroe, 35 App. Div. 527, 54 N. Y Supp. 916.

[159] Granting of leave to appeal, see post, §§ 2621–2626.

2. ORDERS MADE IN ACTIONS IN COURT.

§ 2547. Code provision.

An appeal may be taken to the appellate division of the supreme court from an order made in an action upon notice at a special term or a trial term of the supreme court in either of the following cases:

1. Where the order grants, refuses, continues, or modifies a provisional remedy; or settles or grants or refuses an application to resettle a case on appeal or a bill of exceptions.

2. Where it grants or refuses a new trial, except that where specific questions of fact, arising upon the issues, in an action triable by the court, have been tried by a jury, pursuant to an order for that purpose, as prescribed in section 971 of the Code, an appeal cannot be taken from an order granting or refusing a new trial upon the merits.

3. Where it involves some part of the merits.

4. Where it affects a substantial right.

5. Where, in effect, it determines the action, and prevents a judgment from which an appeal might be taken.

6. Where it determines a statutory provision of the state to be unconstitutional; and the determination appears from the reasons given for the decision thereupon, or is necessarily implied in the decision.

An order, made upon a summary application, after judgment, is deemed to have been made in the action within the meaning of this section.[160]

An order may be made "in an action," within this Code provision, though made preliminary to bringing the action.[161]

Any ruling of the court on the trial can be reviewed only by taking an exception and subsequently appealing from the judgment.[162]

[160] Code Civ. Proc. § 1347.

[161] People ex rel. Morse v. Nussbaum, 55 App. Div. 245, 248, 67 N. Y. Supp. 492.

[162] Order entered on ruling denying motion, made at the opening of the trial, that the trial proceed on an amended complaint instead of

Discretionary orders are appealable if they are embraced within any of the six cases of appealable orders.[163]

This Code provision does not apply to an appeal from an inferior court where the special term is constituted an appellate court.[164]

§ 2548. Order relating to provisional remedy.

An order which grants, refuses, continues or modifies a provisional remedy is appealable.[165] And the appellate division, on an original application in a case where no appeal has been taken, may grant any provisional remedy which has been applied for "without notice" to the adverse party and refused by the supreme court or a justice thereof.[166]

§ 2549. Orders relating to settlement or resettlement of a case.

An order which settles, or grants or refuses an application to resettle a case on appeal or a bill of exceptions, is appealable.[167]

§ 2550. Order granting or refusing new trial.

An order granting or refusing a new trial is appealable, except that where specific questions of fact, arising on the issues, in an action triable by the court, have been tried by a jury, pursuant to an order for that purpose, an appeal cannot be

the original is not appealable. Nutting v. Kings County El. R. Co., 3 App. Div. 423, 38 N. Y. Supp. 654.

[163] McMahon v. Mutual Ben. Life Ins. Co., 12 Abb. Pr. 28; Myers v. Riley, 36 Hun, 20; Martin v. Windsor Hotel Co., 70 N. Y. 101; Sprague v. Dunton, 14 Hun, 490.

[164] Boechat v. Brown, 9 App. Div. 369, 41 N. Y. Supp. 467.

[165] Code Civ. Proc. § 1347, subd. 1.

[166] Code Civ. Proc. § 1348.

[167] Code, § 1347, subd. 1; Zimmer v. Metropolitan St. R. Co., 28 App. Div. 504, 51 N. Y. Supp. 247. Appellate division has no power, on an original application, to settle or resettle case. Ross v. Ingersoll, 55 App. Div. 379, 54 N. Y. Supp. 827.

taken from an order granting or refusing a new trial on the merits.[168]

The exception does not apply to actions where specific questions of fact, though arising in an action not triable by jury, are themselves triable by jury, "as a matter of right" because of a constitutional provision or an express provision of law (Code Civ. Proc. § 970), but only to actions not triable by jury where the submission of issues to a jury is a "matter of discretion" (Code Civ. Proc. 971).[169] The reason why a separate appeal is not allowed from the order is that the court may either accept or reject the findings of the jury and, if rejected, an appeal would be useless.[170] This Code exception does not undertake to define precisely what is to be understood as the "merits" referred to but as the language has there been employed, it probably was not designed to extend beyond "the effect of the evidence appearing on the trial of the issues," and does not preclude the power to review rulings on the trial rejecting or admitting evidence.[171] Where a new trial, in such a case, has been granted or refused on the merits, the only remedy is by a motion for a new trial under section 1003 of the Code.[172]

An appeal may be taken from an order denying a motion for a new trial though judgment has been entered and the time to appeal from the judgment has expired.[173]

§ 2551. Order involving some part of the merits.

An order which "involves some part of the merits" is appealable.[174]

[168] Code Civ. Proc. § 1347, subd. 2.

[169] Framing issues for jury as a matter of right, see vol. 2, p. 2154. Framing issues for jury as a matter of discretion, see vol. 2, p. 2159.

[170] Anderson v. Carter, 24 App. Div. 462, 465, 49 N. Y. Supp. 255.

[171] Bowen v. Becht, 35 Hun, 434. What constitutes granting or refusal of new trial "on the merits," see, also, Anderson v. Carter, 24 App. Div. 462, 468, 49 N. Y. Supp. 255.

[172] Bowen v. Becht, 35 Hun, 434.

[173] Voisin v. Commercial Mut. Ins. Co., 123 N. Y. 120.

[174] Code Civ. Proc. § 1347, subd. 3.

The phrase "involves the merits" refers to matter of substance as distinguished from matter of form. The term has acquired no precise technical meaning but is to be regarded as referring to the strict legal rights of the parties, as distinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend on the discretion or favor of the court.[175] For instance, an order striking out a denial of a material allegation in a pleading affects the merits,[176] as does an order allowing a defendant to set up a new defense which, if established, would be fatal to plaintiff's action,[177] or an order authorizing an amendment of a complaint by inserting a new cause of action,[178] or an order striking a good defense from an answer;[179] but orders denying a motion to strike out portions of a pleading as irrelevant or redundant,[180] or directing a pleading to be made more definite and certain,[181] or refusing leave to reply after the time to reply is past,[182] or directing a sale of perishable property, pending the action,[183] have been held not to affect the merits, though this does not necessarily mean that such orders are not appealable since they may be appealable as affecting substantial rights though not appealable as involving the merits.

[175] Cruger v. Douglas, 8 Barb. 81, which reviews the prior decisions. St. John v. West, 4 How. Pr. 329; Tallman v. Hinman, 10 How. Pr. 90; Tracy v. New York Steam Faucet Mfg. Co., 1 E. D. Smith, 357; Megrath v. Van Wyck, 5 Super. Ct. (3 Sandf.) 751. The term "involves the merits" must be so interpreted as to embrace orders which pass on the substantial legal rights of the suitors, whether such rights do or do not relate directly to the cause of action or subject-matter in controversy. Bolton v. Donavan, 9 N. D. 575.

[176] Otis v. Ross, 8 How. Pr. 193.

[177] Harrington v. Slade, 22 Barb. 161.

[178] Sheldon v. Adams, 41 Barb. 54.

[179] Rapalee v. Stewart, 27 N. Y. 310.

[180] Murphy v. Dickinson, 40 How. Pr. 66; Hughes v. Mercantile Mut. Ins. Co., 41 How. Pr. 253, 10 Abb. Pr. (N. S.) 37.

[181] Geis v. Loew, 15 Abb. Pr. (N. S.) 94, 36 Super. Ct. (4 J & S.) 190.

[182] Thompson v. Starkweather, 2 Code R. 41.

[183] Chapman v. Hammersley, 4 Wend. 173.

§ 2552. Order affecting a substantial right.

An order affecting a substantial right is appealable.

Prior to the amendments of the Code to conform to the present constitution, an order "affecting a substantial right and not resting in discretion" was appealable to the court of appeals. To be appealable to the appellate division, it is immaterial that the order is a discretionary one if it affects a substantial right.[184] "Substantial rights" include "all positive, material and absolute rights, as distinguished from those of a merely formal or unessential nature."[185]

—— **Order imposing conditions.** An order imposing conditions is appealable where the terms imposed affect a substantial right.[186] An order charging a party with the payment of a sum of money affects a substantial right.[187]

—— **Order to show cause.** An order to show cause,[188] or an order denying an application for an order to show cause,[189] does not affect a substantial right and is not appealable.[190-192]

—— **Order on motion for reargument or resettlement.** An order denying a motion for a reargument is not appealable,[193] nor is an order refusing to resettle an order.[194]

—— **Order granting or refusing leave to sue.** An order granting,[195] or refusing,[196] leave to sue is appealable.

[184] King v. Sullivan, 31 App. Div. 549, 553, 52 N. Y. Supp. 130; Security Bank v. National Bank, 2 Hun, 287.

[185] Security Bank v. National Bank, 2 Hun, 287.

[186] People v. New York Cent. R. Co., 29 N. Y. 418.

[187] Hand v. Burrows, 15 Hun, 481; Clark v. Eldred, 54 Hun, 5, 7 N. Y. Supp. 95.

[188] Watt v. Watt, 26 Super. Ct. (3 Rob.) 615, 30 How. Pr. 345.

[189] Grossman v. Supreme Lodge, K. & L. of H., 16 Civ. Proc. R. (Browne) 215, 5 N. Y. Supp. 122.

[190-192] Anderson v. Daley, 159 N. Y. 146.

[193] Reargument of motion. Matter of Grout, 83 Hun, 25, 31 N. Y. Supp. 602, followed in Peterson v. Felt, 61 App. Div. 176, 70 N. Y. Supp. 440. Reargument of appeal. Tucker v. Dudley, 104 App. Div. 191.

[194] Waltham Mfg. Co. v. Brady, 67 App. Div. 102, 73 N. Y. Supp. 540; Hall v. Gilman, 87 App. Div. 248, 84 N. Y. Supp. 279, followed in Garofalo v. Prividi, 43 Misc. 359, 87 N. Y. Supp. 467.

—— **Orders as to parties.** An order bringing in new parties, whether by order of interpleader,[197] or by an order of substitution in case of death or devolution of liability,[198] is appealable.

—— **Orders as to change of place of trial.** An order on a motion for a change of place of trial is appealable.[199]

—— **Order transferring cause to another court.** An order removing the action to a federal court affects a substantial right.[200]

—— **Orders as to pleadings.** Practically all orders relating to pleadings may affect a substantial right so as to be appealable. An order refusing or granting certain relief may in one case, affect a substantial right, while it does not in another case. For instance an order allowing an amendment of the pleadings may or may not affect a substantial right according to the nature of the amendment. If the amendment is merely formal the order is not appealable as affecting a substantial right,[201] while if it is material, as where a cause of action or defense is changed or added, it affects a substantial right so as to be appealable.[202] The following orders have been held appealable as affecting a substantial right: An order denying motion to strike out part of a pleading as irrelevant and redundant;[203] order refusing to strike out answer as sham;[204]

[195] Matter of Commercial Bank, 35 App. Div. 224, 54 N. Y. Supp. 722; Hanover Fire Ins. Co. v. Tomlinson, 58 N. Y. 215.

[196] Miller v. Loeb, 64 Barb. 454.

[197] Wilson v. Duncan, 11 Abb. Pr. 3.

[198] St. John v. Croel, 10 How. Pr. 253; Farnham v. Benedict, 29 Hun, 44.

[199] MacDonald v. MacDonald, 14 Hun, 496; Hoffman v. Sparling, 12 Hun, 83.

[200] DeCamp v. New Jersey Mut. Life Ins. Co., 32 Super. Ct. (2 Sweeny) 481. Contra, Illius v. New York & N. H. R. Co., 13 N. Y. (3 Kern.) 597. See, also, Fargo v. McVicker, 38 How. Pr. 1, 21.

[201] Simmons v. Lyons, 35 Super. Ct. (3 J. & S.) 554.

[202] See Schermerhorn v. Wood, 30 How. Pr. 316.

[203] Jeffras v. McKillop & Sprague Co., 4 T. & C. 578; Neresheimer v. Bowe, 11 Daly, 306. Contra, Emmens v. McMillan Co., 21 Misc. 638, 47 N. Y. Supp. 1099.

[204] Sherman v. Boehm, 15 Abb. N. C. 254.

order denying a motion to compel the acceptance of a pleading;[205] order refusing leave to file a supplemental answer;[206] order allowing a supplemental answer setting up a new defense;[207] order granting[208] or denying[209] a motion to make a pleading more definite and certain. It has been held that an order on a motion to compel different causes of action to be separately stated does not involve a substantial right.[210]

—— **Order on motion for judgment on the pleadings.** An order "granting" judgment on the ground of the frivolousness of a demurrer, answer, or reply is appealable,[211] but an order "refusing" judgment is not, by express Code provision.[212] However, an order denying a motion for judgment on the pleadings, for a sum admitted to be due, is appealable.[213]

—— **Order as to mode of trial.** An order made on an application to form issues for trial by jury affects a substantial right.[214] Trial by jury is a substantial right, and an order directing a reference in a cause in which the party opposing is entitled to a jury trial is appealable.[215] An order vacating an order of reference is appealable.[216]

[205] Pattison v. O'Connor, 23 Hun, 307.

[206] Bowen v. Irish Presbyterian Congregation, 19 Super. Ct. (6 Bosw.) 245.

[207] Harrington v. Slade, 22 Barb. 161; St. John v. Croel, 10 How. Pr. 253.

[208] Brownell v. National Bank of Gloversville, 13 Wkly. Dig. 371; Peart v. Peart, 48 Hun, 79.

[209] Sprague v. Dunton, 14 Hun, 490; Brinkerhoff v. Perry, 59 How. Pr. 155. Contra, Dudley v. Grissler, 37 Super. Ct. (5 J. & S.) 412.

[210] Goldberg v. Utley, 60 N. Y. 427.

[211] Joseph Dixon Crucible Co. v. New York City Steel Works, 9 Abb. Pr. (N. S.) 195, 57 Barb. 447.

[212] Code Civ. Proc. § 537; Carpenter v. Adams, 34 Hun, 429.

[213] Marsh v. West, Bradley & Cary Mfg. Co., 46 Super. Ct. (14 J. & S.) 8.

[214] Ellensohn v. Keyes, 6 App. Div. 601, 39 N. Y. Supp. 774.

[215] Martin v. Windsor Hotel Co., 70 N. Y. 101; Roslyn Heights Land & Imp. Co. v. Burrowes, 22 App. Div. 540, 48 N. Y. Supp. 15; Francis v. Porter, 88 Hun, 325, 34 N. Y. Supp. 752; Central Trust Co. v. New

——**Order denying postponement.** An order denying a motion to postpone the trial is, it seems, not appealable.[217]

—— **Order requiring election between causes of action.** An order denying motion that plaintiff elect between causes of action, where the motion is made before answering, is appealable.[218]

—— **Order of dismissal or nonsuit.** An order dismissing a complaint is not appealable but the appeal must be from the judgment entered thereon,[219] except that where the dismissal is for the failure of plaintiff to proceed the appeal must be from the order rather than the judgment.[220] An order refusing to dismiss the complaint, where the motion is made at the opening of the trial, is not appealable,[221] nor is an order denying a motion for a nonsuit.[222]

—— **Orders relating to depositions.** An order granting or denying a commission to take testimony outside the state affects a substantial right.[223] So does an order granting or refusing an application for the examination of a party before trial.[224] So an order, on settling interrogatories, disallowing

York City & N. R. Co., 18 Abb. N. C. 381; Moffat v. Moffat, 3 How. Pr. (N. S.) 156.

[216] Hoffman v. Sparling, 12 Hun, 83.

[217] Volume 2, p. 2033.

[218] Frieze v. Alabama G. S. R. Co., 99 App. Div. 545, 91 N. Y. Supp. 81.

[219] Citron v. Bayley, 36 App. Div. 130, 55 N. Y. Supp. 382; Kelly v. Theiss, 77 App. Div. 81, 78 N. Y. Supp. 1050. This rule also applies where dismissal is after opening of counsel. Volume 2, p. 2211.

[220] Volume 2, p. 2132.

[221] Dickson v. Knapp, 17 App. Div. 36, 44 N. Y. Supp. 636.

[222] No such order can properly be entered. Brauer v. Oceanic Steam Nav. Co., 77 App. Div. 407, 79 N. Y. Supp. 299.

[223] Burnell v. Coles, 23 Misc. 615, 52 N. Y. Supp. 200; Jemison v. Citizens' Sav. Bank of Jefferson, 85 N. Y. 546. That order allowing a commission is not appealable while order granting is, see Treadwell v. Pomeroy, 2 T. & C. 470; Wallace v. American Linen Thread Co., 2 T. & C. 574.

[224] Green v. Wood, 6 Abb. Pr. 277; Fiske v. Smith, 9 App. Div. 208; 41 N. Y. Supp. 176.

a pertinent question, affects a substantial right,[225] though an appeal does not lie from an order annexing an improper question to a commission since the party may raise the objection on the trial.[226]

—— **Order for discovery.** An order granting[227] or refusing[228] a discovery of books and papers affects a substantial right so as to be appealable.

—— **Orders relating to calendar.** The Code expressly provides that an order granting or refusing a preference on the calendar, where the right thereto does not appear on the pleadings or papers to be used in the case, is not appealable.[229] Except in such a case, an order granting or denying a preference on the calendar affects a substantial right so as to be appealable.[230] So an order placing,[231] or refusing to place,[232] a cause on the short cause calendar, or striking a case therefrom,[233] is appealable. An order striking a cause from the calendar affects a substantial right.[234] It has been held, however, that a decision of a trial justice that a trial shall proceed, accompanying his refusal to strike the case from the calendar of short causes, is a ruling on the trial to which an exception may be taken, and an appeal cannot be taken from an order denying a motion to vacate an order entered on such decision.[235]

If the adverse party does not appear nor oppose the motion for a preference, rightfully claimed by the plaintiff, it seems

[225] Uline v. New York, Cent. & H. R. R. Co., 79 N. Y. 175; Thorp v. Riley, 56 Super. Ct. (24 J. & S.) 254, 3 N. Y. Supp. 547.

[226] Uline v. New York Cent. & H. R. R. Co., 79 N. Y. 175.

[227] Central Nat. Bank v. Clark, 34 Super. Ct. (2 J. & S.) 487; Thompson v. Erie R. Co., 9 Abb. Pr. (N. S.) 212, 230.

[228] Livingston v. Curtis, 12 Hun, 121.

[229] Code Civ. Proc. § 793.

[230] Schwartz v. Wolfrath, 24 Misc. 406, 53 N. Y. Supp. 263.

[231] Buell v. Hollins, 16 Misc. 551, 38 N. Y. Supp. 879.

[232] Herzfeld v. Strauss, 24 App. Div. 95, 49 N. Y. Supp. 92.

[233] Buell v. Hollins, 16 Misc. 551, 38 N. Y. Supp. 879. But see Knowles v. Lichtenstein, 31 App. Div. 496, 52 N. Y. Supp. 1.

[234] People ex rel. Lardner v. Carson, 78 Hun, 544, 29 N. Y. Supp. 619; Beary v. Hoster, 24 State Rep. 879.

[235] Knowles v. Lichtenstein, 31 App. Div. 496, 52 N. Y. Supp. 1.

that the remedy for refusing to grant the preference is not by appeal but by a mandamus proceeding against the judge.[236]

—— **Order to hear exceptions at appellate division.** It has been held that an order denying a motion that the exceptions be heard in the first instance at the appellate division is not appealable.[237]

—— **Orders relating to judgments.** An order vacating or refusing to vacate a judgment affects a substantial right.[238] So does an order on a motion to open a default judgment,[239] or an order denying a motion to vacate the satisfaction of a judgment.[240]

—— **Orders relating to costs and fees.** Orders relating to an extra allowance are appealable.[241] So is an order allowing excessive fees to a referee,[242] or an order depriving a referee of his fees,[243] or an order fixing the commissions of a receiver,[244] or an order denying a motion for retaxation of costs.[245]

—— **Orders relating to writ of assistance.** An order setting aside a writ of assistance affects a substantial right,[246] but an order granting a writ of assistance instead of itself requiring delivery of possession does not affect a substantial right.[247]

236 Hayes v. Consolidated Gas Co., 143 N. Y. 641.

237 Hussey v. Coger, 9 State Rep. 340.

238 Security Bank of N. Y. v. National Bank of Commonwealth, 2 Hun, 287; Kubie v. Miller Bros. & Co., 31 Misc. 460, 64 N. Y. Supp. 448.

239 King v. Sullivan, 31 App. Div. 549, 552, 52 N. Y. Supp. 130.

240 Ward v. Wordsworth, 1 E. D. Smith, 598.

241 Duncan v. DeWitt, 7 Hun, 184; Colton v. Morrissy, 6. Wkly. Dig. 165; People v. New York Cent. R. Co., 29 N. Y. 418.

242 Innes v. Purcell, 2 T. & C. 538.

243 Hobart v. Hobart, 86 N. Y. 636.

244 Hanover Ins. Co. v. Germania Ins. Co., 46 Hun, 308.

245 Rice v. Childs, 28 Hun, 303. Matter of Collis, 78 App. Div. 495, 79 N. Y. Supp. 801.

246 Chamberlain v. Choles, 35 N. Y. 477.

247 Title Guarantee & Trust Co. v. American Power & Const. Co., 95 App. Div. 192, 88 N. Y. Supp. 502.

§ 2553. Order in effect determining the action.

An order which, in effect, determines the action, and prevents a judgment from which an appeal might be taken, is appealable.[248]

An order granting an absolute and perpetual writ of prohibition enjoining the court from proceeding further with a pending action is such an order,[249] as is an order which absolutely and unconditionally stays, without limit, the proceedings in an action, before the entry of judgment;[250] but an order made after verdict, giving leave to defendant to renew a motion made and denied before the trial, to set aside an order of arrest, and staying judgment on the verdict in the meantime, does not, "in effect, determine the action."[251] An order removing the cause to a federal court does not determine the action and prevent a judgment.[252] An order dismissing an appeal from an order allowing defendants, as bail for the appearance of a party arrested, further time for the surrender of their principal, is such an order.[253]

§ 2554. Order declaring statute unconstitutional.

An order which determines a statutory provision of the state to be unconstitutional is appealable, where the determination appears from the reasons given for the decision thereupon or is necessarily implied in the decision.[254]

3. Orders Made in an Action by a Judge.

§ 2555. Code provision.

An appeal may be taken from an order made in an action,

248 Code Civ. Proc. § 1347, subd. 5.

249 People ex rel. Egan v. Justices of N. Y. Marine Ct., 81 N. Y. 500.

250 Knowlton v. Providence & N. Y. S. S. Co., 53 N. Y. 76, 80; Bennett v. Stevenson, 53 N. Y. 508.

251 Miannay v. Blogg, 41 N. Y. 521.

252 Illius v. New York & N. H. R. Co., 13 N. Y. (3 Kern.) 597.

253 Bank of Geneva v. Reynolds, 33 N. Y. 160.

254 Code Civ. Proc. § 1347, subd. 6.

on notice, by a judge or justice out of court, in a case where the order would be appealable if made by the court.[255]

4. Orders Made in Special Proceedings.

§ 2556. Code provision.

An appeal may be taken to the appellate division of the supreme court from an order affecting a substantial right made in a special proceeding at a special term or a trial term of the supreme court; or made by a justice thereof, in a special proceeding instituted before him pursuant to a special statutory provision,[256] or instituted before another judge, and transferred to or continued before him.[257]

The last clause, it seems, relates only to a proceeding transferred from one judge to another in the same court, i. e., the supreme court.[257a]

Throop's note to this title states that it "contains only general provisions relating to appeals in special proceedings, leaving those which apply exclusively to particular kinds of special proceedings" to be treated of in connection with the Code chapters devoted to particular special proceedings. Whether an order in any particular special proceeding is appealable often depends on the statute regulating such special proceeding.

This Code provision does not confer the right to appeal from an order in a case where the statute expressly prescribes that the order shall be final.[257b] A statutory provision that the order "shall be final and conclusive" has been held to preclude an

[255] Code Civ. Proc. § 1348.

[256] An order to investigate the financial affairs of a town is appealable as an order made by a judge "pursuant to a special statutory provision." Matter of Town of Hempstead, 32 App. Div. 6, 52 N. Y. Supp. 618.

[257] Code Civ. Proc. § 1356. Order which affirms an apportionment and assessment which constitutes a lien on appellant's real estate, and under which it may be sold, affects a substantial right. Matter of Klock, 30 App. Div. 24, 28, 51 N. Y. Supp. 897.

[257a] Matter of Rafferty, 14 App. Div. 55, 43 N. Y. Supp. 760.

[257b] Code Civ. Proc. § 1361.

appeal,[257c] but the right to review the decision in a matter affecting substantial rights must be deemed to exist unless the intent to destroy it is expressed with great clearness;[257d] and it has been held that a provision in the statute that "the decision of the county judge shall be final" does not preclude an appeal to the appellate division.[257e] Furthermore, it seems that a statute making certain orders final and thereby restricting the right to appeal does not apply when the court had no jurisdiction to make the order appealed from.[257f]

The order, to be appealable need not be a final order,[257g] and it is immaterial that the granting or refusing of the order is discretionary.[257h]

An order vacating a judgment entered by confession affects a substantial right in a special proceeding,[257i] within this Code section, as does an order striking the name of a voter from the registry list,[257j] or an order denying a motion for a retaxation of costs,[257k] or an order of reference in certiorari proceedings to review an assessment where the writ was issued without jurisdiction.[257l]

The fact that a party has the right, in the first instance, to make an application either to a special term of the supreme court or to the appellate division, and elects to apply to the special term, does not preclude an appeal from such determination to the appellate division.[257m]

[257c] Matter of Central Park Commissioners, 50 N. Y. 493; Matter of Canal & Walker Streets, 12 N. Y. 406; Matter of New York Central R. Co., 11 N. Y. 276.

[257d] Matter of Brady, 69 N. Y. 215, 220.

[257e] Matter of Anderson v. School Dist. No. 15, 89 App. Div. 231, 85 N. Y. Supp. 943.

[257f] Matter of Tuthill, 36 App. Div. 492, 494, 55 N. Y. Supp. 657.

[257g] Hart v. Johnson, 43 Hun, 505.

[257h] Matter of Commercial Bank, 35 App. Div. 224, 54 N. Y. Supp. 722; Matter of Tilden, 56 App. Div. 277, 67 N. Y. Supp. 879; Matter of Light, 30 App. Div. 50, 51 N. Y. Supp. 743.

[257i] Belknap v. Waters, 11 N. Y. 477.

[257j] Matter of Ward, 29 Abb. N. C. 187, 198, 20 N. Y. Supp. 606.

[257k] Matter of Collis, 78 App. Div. 495, 79 N. Y. Supp. 801.

[257l] People ex rel. Rochester Lamp Co. v. Feitner, 65 App. Div. 224, 228, 72 N. Y. Supp. 641.

[257m] Matter of Light, 30 App. Div. 50, 52, 51 N. Y. Supp. 743.

§ 2557. Orders in mandamus proceedings.

An appeal from an order granting a peremptory writ of mandamus, where an alternative writ was not previously issued, must be taken as from a final order made in a special proceeding; but an appeal from a final order made on an alternative mandamus must be taken as an appeal from a judgment.[258]

An order directing an alternative writ of mandamus does not affect a substantial right so as to be appealable,[259] though where the order was peremptory except as to a portion of the relief demanded, the questions raised were held to be properly reviewable.[260]

§ 2558. Orders in contempt proceedings.

An order punishing for contempt is appealable [261] as is an order adjudging a party guilty of contempt in having violated an injunction and directing a reference to ascertain the damages sustained,[262] or an order denying a motion on notice for an order to show cause in contempt proceedings,[263] or an order denying a motion to vacate an order adjudging a person to be in contempt,[264] but an appeal from an order committing for contempt, unless the person adjudged guilty performs specified acts, is premature.[265]

[258] Code Civ. Proc. § 2087.

[259] Such an order is in the nature of an order to show cause. People v. Lumb, 6 App. Div. 26, 39 N. Y. Supp. 514; People ex rel. Levenson, v. O'Donnel, 99 Div. 253, 90 N. Y. Supp. 961.

[260] Matter of Goodwin, 30 App. Div. 418, 51 N. Y. Supp. 355.

[261] Richie v. Bedell, 22 Wkly. Dig. 563; Smith v. Drury, 22 Wkly. Dig. 3. Brinkley v. Brinkley, 47 N. Y. 40. It is immaterial that punisment is for a criminal contempt. People ex rel. Negas v. Dwyer, 90 N. Y. 402. It was formerly held by the court of appeals that an order "refusing" to punish for contempt was not appealable. Carrington v. Florida R. Co., 52 N. Y. 583.

[262] In re De Long, 25 Civ. Proc. R. 363.

[263] People ex rel. Platt v. Board of State Canvassers, 74 Hun, 179, 26 N. Y. Supp. 346.

[264] Wolf v. Buttner, 6 Misc. 119, 26 N. Y. Supp. 52.

[265] The final order should be awaited and an appeal taken from that.

§ 2559. Orders in condemnation proceedings.

A condemnation proceeding is a special proceeding. In 1890 there was added to the Code a chapter (23) governing the proceedings for the condemnation of real property. This Code chapter provides for a "judgment" on the trial of the right to condemn and for the appointment of commissioners, if the decision is in favor of plaintiff, to ascertain the compensation to be made to the owners for the property to be taken. It will be noticed that a "judgment" is provided for in a special proceeding, such judgment being in the nature of an interlocutory judgment. After the commissioners make a report, a motion for its confirmation is made and, if the report is confirmed, a "final order" is entered directing that compensation be made to the owners according to the report and that on payment of such compensation the plaintiff shall be entitled to enter into the possession of the property condemned. Section 3375 provides for an appeal from the "final order" and authorizes a review of the "judgment" and proceedings antecedent thereto if the appellant states in his notice of appeal that they will be brought up for review, and exceptions shall have been taken, and a case, or a case and exceptions shall have been made, settled, and allowed. Section 3376, authorizes an appeal from the "judgment" where it is entered "in favor of the defendant," but no appeal from the "judgment" is provided for where it is in favor of the plaintiff. There being no provision of the statute permitting an appeal from a judgment in favor of the plaintiff condemning lands and appointing commissioners to ascertain the compensation to be made to the owner, defendant's remedy is to wait and appeal from the final order as authorized by

Greite v. Henricks, 71 Hun, 11, 24 N. Y. Supp. 545. On motion to punish a person for contempt for failing to appear and submit to an examination pursuant to an order of a justice, an order requiring such party to appear and submit to an examination, otherwise the commitment to issue, was not a final order, and no appeal therefrom would lie. Siegel v. Solomon, 92 N. Y. Supp. 238; Field v. White, 102 App. Div. 365, 92 N. Y. Supp. 848. Contra, Rupert v. Lee, 101 App. Div. 492, 92 N. Y. Supp. 75.

section 3375 of the Code, when the judgment may be reviewed.[266] It is held, however, that section 3375 of the Code which provides for an appeal to the appellate division from the "final order" was not intended to limit appeals to final orders only, but that when so taken such appeals should have a special and particular effect.[267] An order confirming[268] or setting aside[269] or sending back for further consideration,[270] the report of the commissioners, is appealable.

§ 2560. Orders relating to writ of prohibition.

An order granting a writ of prohibition affects a substantial right so as to be appealable,[271] as does an order setting aside an alternative writ of prohibition commanding a referee to refrain from further proceedings in the examination of a party before trial.[272]

§ 2561. Orders in habeas corpus proceedings.

An appeal may be taken from an order refusing to grant a writ of habeas corpus, or a writ of certiorari, to inquire into

[266] Erie R. Co. v. Steward, 59 App. Div. 187, 69 N. Y. Supp. 57, followed in Village of St. Johnsville v. Smith, 61 App. Div. 380, 70 N. Y. Supp. 880. Prior to 1890, it was held that the "order" appointing commissioners was appealable. Matter of Broadway & Seventh Ave. R. Co., 69 Hun, 275, 23 N. Y. Supp. 609; Matter of South Market St., 80 Hun, 246, 29 N. Y. Supp. 1030; Matter of City of Utica, 73 Hun, 256, 26 N. Y. Supp. 564.

[267] Manhattan R. Co. v. O'Sullivan, 6 App. Div. 571, 40 N. Y. Supp. 326. See Matter of City of Rochester, 102 App. Div. 99, 92 N. Y. Supp. 475.

[268] Matter of City of Rochester, 24 App. Div. 383, 48 N. Y. Supp. 764.

[269] Manhattan R. Co. v. O'Sullivan, 6 App. Div. 571, 46 N. Y. Supp. 326.

[270] Order sending report back to commissioners appointed in condemnation proceedings to have stated other material facts affects a substantial right. Board of Water Com'rs v. Shutts, 25 App. Div. 22, 49 N. Y. Supp. 319.

[271] People ex rel. Egan v. Justices of N. Y. Marine Ct., 81 N. Y. 500. See, also, Code Civ. Proc. § 2101.

[272] People ex rel. Morse v. Nussbaum, 55 App. Div. 245, 67 N. Y. Supp. 492.

the cause of detention, or from a final order, made upon the return of such a writ, to discharge or remand a prisoner, or to dismiss the proceedings. When a final order is made, to discharge a prisoner, upon his giving bail, an appeal therefrom may be taken, before bail is given; but where the appeal is taken by the people, the discharge of the prisoner upon bail shall not be stayed thereby. An appeal does not lie, from an order of the court or judge, before which or whom the writ is made returnable, except as prescribed in this section.[273]

It follows that no appeal will lie from an order of reference to aid the information of the court, where made in such proceeding.[274]

§ 2562. Orders in supplementary proceedings.

Subject to the Code rule laid down in a preceding volume,[275] the following orders, inter alia, have been held appealable as affecting a substantial right: Order refusing to appoint a receiver;[276] order refusing to dismiss the proceedings;[277] order denying a motion to direct the application of property or money to the payment of the judgment;[278] order adjudging a third person guilty of a contempt and ordering a reference to determine the damages sustained;[279] order for sale of a cause of action by a receiver in supplementary proceedings.[280] But an order which merely requires a judgment debtor to answer a question as to the name of his employer does not affect a substantial right so as to be appealable.[281]

[273] Code Civ. Proc. § 2058; Matter of Larson, 96 N. Y. 381. See, also, Matter of Scrafford, 59 Hun, 320, 12 N. Y. Supp. 943.

[274] People ex rel. Keator v. Moss, 6 App. Div. 414, 39 N. Y. Supp. 690.

[275] Volume 3, pp. 3267–3269.

[276] Dollard v. Taylor, 33 Super. Ct. (1 J. & S.) 496.

[277] Robens v. Sweet, 48 Hun, 436, 1 N. Y. Supp. 839.

[278] Billington v. Billington, 50 Hun, 602, 4 N. Y. Supp. 504.

[279] Hart v. Johnson, 43 Hun, 505.

[280] Matter of Patterson, 12 App. Div. 123, 42 N. Y. Supp. 495.

[281] Milliken v. Thomson, 54 Super. Ct. (22 J. & S.) 393.

(B) FROM COURT OTHER THAN SUPREME OR SURROGATE'S COURT.

§ 2563. Scope of sub-article.

This sub-article will treat of the judgments and orders appealable to the appellate division from the county court and other courts of record other than the supreme court, except that the special statutory provisions as to appeals from a surrogate's court or from municipal courts will not be noticed.

§ 2564. Final judgments.

A final judgment rendered by a county court or any other court of record possessing original jurisdiction, where an appeal therefrom to a court other than the supreme court is not expressly given by statute, is appealable to the appellate division.[282] On the appeal from such judgment, an order granting or refusing a new trial on any of the Code grounds for granting a new trial on the judge's minutes is reviewable,[283] provided the intention to review the order is specified in the notice of appeal.

This Code section authorizes appeals from judgments entered in the county court on affirming or reversing judgments, or final orders in special proceedings, rendered in a justice's court.[284] A judgment of the county court entered on the report of a referee is appealable, under this Code section, without first moving for a new trial.[285] An appeal from a decree of a county judge on the final accounting of an assignee of an insolvent debtor is an appeal from a final judgment.[286]

§ 2565. Interlocutory judgments.

An appeal from an interlocutory judgment is permissible only when that judgment is rendered in the supreme court.

[282, 283] Code Civ. Proc. § 1340.
[284] Warner v. Henderson, 25 Hun, 303.
[285] Kilmer v. O'Brien, 13 Hun, 224; Cook v. Darrow, 22 Hun, 306
[286] Matter of Beckwith, 15 Hun, 326.

No appeal can be taken from an interlocutory judgment rendered by a county court.[287]

§ 2566. Orders in actions.

An appeal may be taken to the appellate division, from an order "affecting a substantial right," made by the court or a judge, in an action brought in, or taken by appeal to, a court of record specified in section 1340 of the Code.[288]

A holding of the court of appeals to the effect that appeals to the supreme court from orders of the county court were confined to actions originating in the county court was made nugatory by the amendment of section 1342 in 1881, which extended the jurisdiction of the appellate division to cases taken by appeal to the county court.[289] In other words, an order made in an action brought in a justice's court is appealable to the appellate division, after an appeal is taken to the county court, the same as an order made in an action commenced in the county court.

The order, to be appealable, must be one made in an action. It follows that no appeal lies from an order of the county court granting or refusing leave to issue execution on a justice's judgment after a transcript has been filed with the county clerk.[290]

Having already considered what is an order "affecting a substantial right,"[291] the question remains as to whether an order involving the discretion of the lower court is appealable. The weight of authority is that a discretionary order is not appealable, on the theory that the discretion of one court is not

[287] Russ v. Maxwell, 94 App. Div. 107, 116, 87 N. Y. Supp. 1077, where the appeal was, however, considered on the merits on a stipulation that the appeal be treated as a motion for a new trial on exceptions.

[288] Code Civ. Proc. § 1342.

[289] Kilts v. Neahr, 101 App. Div. 317, 91 N. Y. Supp. 945; Kincaid v. Richardson, 25 Hun, 237.

[290] Townsend v. Tolhurst, 57 Hun, 40, 10 N. Y. Supp. 378; Kincaid v. Richardson, 25 Hun, 237.

[291] See ante, § 2552.

reviewable by another court,[292] but the later cases incline to the rule that such orders are appealable if they affect a substantial right.[293] It is submitted that such orders should be appealable since no good reason is apparent why the exercise of discretion by a judge of the supreme court should be reviewable by appeal while the exercise of discretion by a minor court be held nonreviewable by the appellate division.

An order affirming a judgment is not appealable since the appeal should be from the judgment entered on such order.[294]

An order of the county court dismissing an appeal from a justice of the peace affects a substantial right so as to be appealable.[295]

§ 2567. Orders in special proceedings.

An appeal may be taken to the appellate division from an order affecting a substantial right made by a court of record, possessing original jurisdiction, or a judge thereof, in a special proceeding instituted in that court, or before a judge thereof, pursuant to a special statutory provision, or instituted before another judge and transferred to, or continued before, the judge who made the final order. But this section does not apply to a case, where an appeal from the order, to a court, other than the appellate division is expressly given by statute.[296]

[292] Stebbins v. Cowles, 30 Hun, 523; Myers v. Riley, 36 Hun, 20; Kugelman v. Rhodes, 36 Hun, 269; Wright v. Chase, 77 Hun, 90, 28 N. Y. Supp. 310. Order granting or refusing new trial. Myers v. Riley, 36 Hun, 20; Bantleon v. Meier, 81 Hun, 162, 30 N. Y. Supp. 706; Breichbeil v. Powles, 60 Hun, 585, 15 N. Y. Supp. 465.

[293] Kilts v. Neahr, 101 App. Div. 317, 91 N. Y. Supp. 945; King v. Sullivan, 31 App. Div. 549, 52 N. Y. Supp. 130; Cramer v. Lovejoy. 41 Hun, 581; Kubie v. Miller Bros. & Co., 31 Misc. 460, 64 N. Y. Supp. 448; Clark v. Eldred, 54 Hun, 5, 7 N. Y. Supp. 95.

[294] Waltenberg v. Bernhard, 27 Misc. 794, 58 N. Y. Supp. 325; Pasternak v. Weiss, 29 Misc. 314, 60 N. Y. Supp. 494; Dierig v. Callahan 35 Misc. 30, 70 N. Y. Supp. 210.

[295] Hammond v. Carpenter, 29 How. Pr. 43; Horr v. Seaton, 18 Wkly. Dig. 510; Kuntz v. Licht. 8 Hun, 14.

[296] Code Civ. Proc. § 1357; Ithaca Agr. Works v. Eggleston, 107 N. Y. 272; Matter of Klock, 30 App. Div. 24, 51 N. Y. Supp. 897.

This section applies, inter alia, to appeals from orders in supplementary proceedings.[297]

The cases construing section 1356 of the Code and this section are set forth in a preceding paragraph.[298]

No appeal lies to the appellate division, except where special provision is made therefor, from an order of the county court made on appeal from an order in a special proceeding instituted before a justice of the peace.[299]

ART. IV. TO THE APPELLATE TERM.

§ 2568. General considerations.

Appeals from final judgments of inferior and local courts which, before the abolition of the superior courts and court of commons pleas by the present Constitution, were heard in said court of common pleas for New York city and in the superior court of Buffalo, may now be taken to the supreme court.[300] In other words appeals from the city court of New York, the municipal courts of the boroughs of Manhattan and the Bronx, and the municipal court of Buffalo, may be taken to the supreme court [301] to be heard by justices of the appellate division appointed by the appellate division.[302] In the first judicial district these justices so appointed form what is known as the appellate term.

This article will not undertake a consideration of what judgments or orders of the said courts are appealable, except those of the city court of New York. The Greater New York charter fixes the right to appeal from the municipal courts of

[297] Order directing sale of property by receiver. Matter of Patterson, 12 App. Div. 123, 42 N. Y. Supp. 495. Order vacating order for examination. Schenck v. Irwin, 60 Hun, 361, 15 N. Y. Supp. 55.

[298] See ante, § 2556.

[299] Matter of Rafferty 14 App. Div. 55, 43 N. Y. Supp. 760, followed in Matter of Soop, 106 App. Div. 341, 94 N. Y. Supp. 463, where appeal from an order of the county court reversing a final order in summary proceedings was dismissed.

[300, 301] Code Civ. Proc. § 1340.

[302] Code Civ. Proc. § 1344.

New York and the Buffalo charter fixes the right to appeal from the municipal court of Buffalo. Said courts are not courts of record, and hence a consideration of appeals therefrom is not within the scope of this work.

§ 2569. Appeal from City Court of New York.

Prior to 1902 there was a general term of the city court to which appeals could be taken but now that court is abolished and a direct appeal to the supreme court is provided for.

—— **From final judgments.** An appeal to the supreme court may be taken from a final judgment rendered in the city court of New York, in a case where an appeal may be taken to the appellate division of the supreme court, from a final judgment rendered in the supreme court, as prescribed in section 1346 of the Code.[303]

—— **From interlocutory judgments.** An appeal to the supreme court may be taken from an interlocutory judgment of the city court of New York and on such an appeal the supreme court may review any exercise of discretion by the court or judge below.[304]

—— **From orders.** An appeal to the supreme court may be taken from an order made at chambers, or at a special or trial term, of the city court of New York, or from an order made by a judge thereof out of court, in a case where an appeal may be taken to the appellate division from an order of the supreme court, as set forth in sections 1347 and 1348 of the Code.[305] Orders resting in discretion, if otherwise appealable, may be brought up for review, since the Code provision expressly provides that the supreme court "shall have full power to review any exercise of discretion by the court or judge below.[306] The decisions prior to 1902 holding that discretionary orders were not appealable [307] no longer state the law.

[303] Code Civ. Proc. § 3188, as amended in 1902.

[304] Code Civ. Proc. §§ 3188, 3189, as amended in 1902.

[305, 306] Code Civ. Proc. § 3189, as amended in 1902.

[307] Brown v. Georgi, 26 Misc. 128, 56 N. Y. Supp. 923; Streep v. McLoughlin, 36 Misc. 165, 72 N. Y. Supp. 1061.

CHAPTER III.

WHO MAY APPEAL.

Parties, § 2570.
—— Party in default.
—— Successful party.
—— Party whose interest has terminated.
—— One of several parties.
—— Executors and administrators.
—— Trustees.
—— Corporations.
—— Officers or stockholders of corporation.
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—— Purchasers at judicial sales.
—— Witnesses.
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—— Persons examined in supplementary proceedings.
Person who has not appealed to intermediate court, § 2573.

§ 2570. Parties.

The Code provides that "a party aggrieved may appeal * * * except where the judgment or order, of which he complains, was rendered or made upon his default."[1] If the

[1] Code Civ. Proc. § 1294. Whether word "party" applies only to a party to the action, see next section. That one unnecessarily joined as a party may appeal, see Thomson v. Fairfield, 50 State Rep. 472, 21 N. Y. Supp. 712.

person who desires to appeal is a party to the action, it is necessary only that he be "aggrieved," provided the judgment or order was not made on his default. In other words, a party cannot appeal from a judgment or order which in no way injures or jeopardizes him or his property.[2] Persons who would gain nothing by a reversal are not "aggrieved."[3] The party appealing must have an interest in the controversy,[4] and that interest must be actual and practical, as distinguished from a merely theoretical interest in the controversy;[5] but a property or pecuniary interest is not necessary.[6] A party may be said to be aggrieved by any order which affects its standing in court in any way, though it involves only the development of such information as may be possessed by one of its officers.[7] A party to a special proceeding cannot appeal in behalf of others interested.[8]

A party, an action against whom is dismissed, is not aggrieved.[9] So an additional defendant brought in by an order vacating a judgment against a sole defendant, and allowing an amendment of the summons and complaint, is not aggrieved by the order.[10] So a defendant joined as a party merely to enjoin him pending the action cannot appeal from a judgment on the merits which does not affect him.[11] And a person substituted as a defendant cannot appeal from the order of sub-

[2] Bullard v. Kenyon, 78 Hun, 26, 29 N. Y Supp. 772; Miller v. Fiss, 21 Misc. 66, 46 N. Y. Supp. 967.

[3] Hyatt v. Dusenbury, 106 N. Y. 663.

[4, 5] Bryant v. Thompson, 128 N. Y. 426, 436.

[6] People ex rel. Burnham v. Jones, 110 N. Y. 509; People ex rel. Thomas v. Sackett, 15 App. Div. 290, 44 N. Y. Supp. 593.

[7] Sherman v. Beacon Const. Co., 58 Hun, 143, 11 N. Y. Supp. 369, in which case the defendant, a corporation, appealed from an order denying a motion to vacate an order directing its chairman to appear before a referee for examination to enable plaintiff to amend his complaint.

[8] Matter of City of New York, 77 App. Div. 146, 78 N. Y. Supp. 1030.

[9] Jerry v. Blair, 62 App. Div. 590, 71 N. Y. Supp. 189.

[10] Grant v. Hubbell, 34 Super. Ct. (2 J. & S.) 224.

[11] Wheat v. Rice, 15 Wkly. Dig. 104.

stitution since he is not aggrieved thereby.[12] But the plaintiff in an injunction action may appeal from an order fixing damages in a proceeding against the sureties, since he is ultimately liable to the sureties for any money they may be compelled to pay.[13] A plaintiff who has appealed from an order granting defendant a new trial cannot obtain a dismissal of defendant's appeal from the judgment.[14]

——**Party in default.** A party cannot appeal from a judgment or order made on his default. The Code so provides[15] and it was so held prior to the Codes[16] on the ground that the party complaining was not aggrieved. The rule applies to all judicial proceedings where an appeal is allowed.[17] It applies to a default on the part of plaintiff,[18] as well as to a default by defendant. It applies though the complaint does not state a cause of action.[19] So a judgment by default in the appellate division is not appealable to the court of appeals.[20] But an order for an extra allowance may be appealed from, though taken by default of the party in appearing at the trial, where the court has no power to grant such allowance, since the notice that such an allowance would be asked for would not be implied from the notice of trial.[21]

Where defendant in a divorce suit appears but does not answer, though he does file exceptions to the referee's report,

[12] Abbot v. New York, L. E. & W. R. Co., 120 N. Y. 652.

[13] Harter v. Westcott's Exp. Co., 155 N. Y. 211.

[14] Weeks v. Coe, 36 App. Div. 339, 55 N. Y. Supp. 263.

[15] Code Civ. Proc. § 1294; New York Co-op. Bldg. & Loan Ass'n v. Brennan, 62 App. Div. 610, 70 N. Y. Supp. 916; Oliver v. French, 80 Hun, 175, 30 N. Y. Supp. 52; Park v. Park, 24 Misc. 372, 53 N. Y. Supp. 677. Appeal from order directing a writ of assistance dismissed where defendants were in default in not showing cause, if any existed, why the writ should not issue, in Title Guarantee & Trust Co. v. American Power & Const. Co., 95 App. Div. 192, 88 N. Y. Supp. 502.

[16] Flake v. Van Wagenen, 54 N. Y. 25.

[17] Adams v. Oakes, 20 Johns. 282.

[18] Delmar v. Delmar, 65 App. Div. 582, 72 N. Y. Supp. 959.

[19] Pope v. Dinsmore, 8 Abb. Pr. 429, and note.

[20] Stevens v. Glover, 83 N. Y. 611.

[21] Voorhis v. French, 47 Super. Ct. (15 J. & S.) 364.

the judgment is one by default.[22] But where defendant appears at the trial solely for the purpose of demanding a jury trial and then withdraws from further participation in the trial which thereupon proceeds, the judgment is not one rendered on a default so as to preclude his right to appeal.[23] So a judgment is not taken by default where defendant unsuccessfully demurs and where, though he fails to answer, he opposes the motion for final judgment.[24] And where plaintiff took judgment without notice to defendant after the overruling of a demurrer to the complaint, and defendant's failure to answer over, defendant was entitled to appeal.[25] Furthermore, it would seem that a defendant is not in default so as to preclude his right to appeal merely because he serves no answer where the judgment merely grants affirmative relief demanded by a co-defendant in his answer.[26]

—— **Successful party.** A party in whose favor a judgment is entered, or an order made, cannot be aggrieved by it, and he is, therefore, in no position to claim the right of appeal.[27] For instance, a party who successfully opposes the granting of a motion is not prejudiced by a provision in the order giving the defeated party the right to renew the application.[28] So a plaintiff who, on his motion, obtained an amendment to a judgment for defendant so as to make the judgment one of dismissal for failure of proof, cannot appeal from the judgment as corrected, it superseding the original judgment and being for plaintiff's own benefit.[29]

[22] Goldsmith v. Goldsmith, 11 Wkly. Dig. 551.

[23] King v. Ross, 28 App. Div. 371, 51 N. Y. Supp. 138.

[24] Kerr v. Dildine, 60 Hun, 315, 15 N. Y. Supp. 58.

[25] People v. Manhattan Real Estate & Loan Co., 74 App. Div. 535, 77 N. Y. Supp. 837; Mathot v. Triebel, 102 App. Div. 426, 92 N. Y. Supp. 512.

[26] Bliss v. Fosdick, 76 Hun, 508, 510, 27 N. Y. Supp. 1053, followed in Clark v. Strong, 93 N. Y. Supp. 514.

[27] Hooper v. Beecher, 109 N. Y. 609; Morrison v. New York El. R. Co., 57 State Rep. 246, 26 N. Y. Supp. 640; Village of Canandaigua v. Benedict, 13 App. Div. 600, 43 N. Y. Supp. 630.

[28] Union Surety & Guaranty Co. v. Greater New York Amusement Co., 87 App. Div. 287, 84 N. Y. Supp. 286.

[29] Reichenberg v. Interurban St. R. Co., 90 N. Y. Supp. 384.

There is an exception to this rule, however, in that a party may appeal from a judgment in his own favor to test the validity of the allowance of a counterclaim, and this is so notwithstanding he has collected his judgment by execution.[30] Furthermore, the successful party may appeal for the purpose of increasing the amount of his recovery; and this rule holds although he has accepted payment of the amount of the judgment.[31]

—— **Party whose interest has terminated.** A party whose interest has ceased before judgment, as where the plaintiff conveys all his interest in the subject-matter of the litigation during the pendency of the action, cannot appeal.[32] This rule does not apply, however, to preclude the right of one adjudged a bankrupt, pending an appeal by him to the appellate division, to appeal to the court of appeals, where the judgment of affirmance is with costs.[33]

—— **One of several parties.** Where judgment has been rendered against two or more defendants in a case where a several judgment against either would be proper, either of such defendants may appeal from the judgment if he is aggrieved thereby, whether or not his co-defendants join with him in the appeal. For instance, one of several defendants, where the liability of the defendants is several, may appeal to the court of appeals from an order granting a new trial, on giving a stipulation for judgment absolute against him in case the order should be affirmed; if the other defendants do not desire to appeal or to give a stipulation, they can go back to a new trial.[34] So a defendant sued as an individual together with others sued as a firm may alone appeal from so much of the interlocutory judgment as overrules his demurrer to the complaint for failure to state a cause of action against him

[30] Corlies v. Ferguson, 10 Wkly. Dig. 489. See, also, Howland v. Coffin, 47 Barb. 653.

[31] See post § 2580.

[32] Kiefer v. Winkens, 39 How. Pr. 176, 182; Kelly v. Israel, 11 Paige, 147; Idley v. Bowen, 11 Wend. 227; Reid v. Venderheyden, 5 Cow. 719.

[33] Sanford v. Sanford, 58 N. Y. 67.

[34] Williams v. Western Union Tel. Co., 93 N. Y. 162, 193.

individually.[35] Where a part of the defendants, in an action by a receiver, desire to appeal, they should bring in as respondents the other defendants who have adverse rights, it not being sufficient to bring in merely the receiver who has no substantial interest in the questions involved.[36] This rule as to an appeal by part does not, however, preclude an appeal by all the co-parties who are aggrieved. Thus, where a joint answer that presents a defense for one defendant is adjudged frivolous as to all the defendants, all may join in the appeal though the defendant in whose favor a good defense was presented could have appealed alone.[37] Furthermore, an appeal by one party does not preclude a co-party from appealing.[38] However, an appeal taken by a co-plaintiff, in which the others do not join, presents no substantial question to be considered.[39]

One of two or more parties cannot, however, appeal from an order which only affects a co-party who does not appeal. For instance, where two defendants answer separately, one cannot appeal from an order denying to the other an issue to try the defense.[40] So a defendant sued jointly cannot appeal from an order made on the trial, or the judgment entered thereon, dismissing the complaint as to his co-defendant.[41] But a defendant sued in tort has an interest in an order bringing in a new defendant and directing a supplemental complaint which he must answer or be in default, sufficient to permit him to appeal from such order.[42]

—— **Executors and administrators.** An executor or administrator cannot appeal from a judgment or order which does not injuriously affect him, in an action brought by or against him.[43] Executors and trustees under a will, who ask the court

[35] Polack v. Runkle, 56 App. Div. 365, 67 N. Y. Supp. 753.
[36] Hubbell v. Syracuse Iron Works, 28 Abb. N. C. 380.
[37] Bank of Cooperstown v. Corlies, 1 Abb. Pr. (N. S.) 412, 419.
[38] Brown v. Richardson, 27 Super. Ct. (4 Rob.) 603.
[39] Van Vleck v. Ballou, 40 App. Div. 489, 58 N. Y. Supp. 125.
[40] New Orleans Gaslight & Banking Co. v. Dudley, 8 Paige, 452.
[41] Popham v. Twenty-third St. R. Co., 48 Super. Ct. (16 J. & S.) 229.
[42] Heffern v. Hunt, 8 App. Div. 585, 40 N. Y. Supp. 914.
[43] Matter of Richmond, 63 App. Div. 488, 71 N. Y. Supp. 795.

for directions in regard to their duty, and for a judgment as to which of two persons is entitled to a certain bequest, which directions are given and acquiesced in by both of the alleged claimants of the fund, are not "aggrieved;"[44] though the rule would be otherwise if the appeal was by a beneficiary under the will.[45] Executors cannot appeal as parties aggrieved where the parties directly interested in the litigation are joined in the controversy and have acquiesced in the decision.[46] Executors may appeal from a judgment in an action brought by them to compel defendant to transfer a certificate of stock where the question is whether the executors or defendant are entitled thereto.[47]

—— **Trustees.** A trustee of a fund for the security for an indebtedness to others, who sues to collect such indebtedness is aggrieved by a judgment which reduces and limits the number of those who are creditors on it.[48] One of several trustees of a fund who has sued alone, without objection, may appeal from the judgment without regard to such other trustees.[49] A trustee who sues alone in the interest of the trust should permit his name to be used by a cestui que trust in taking an appeal from a judgment adverse to the latter; and the special term may, by order, permit such an appeal to be brought.[50]

—— **Corporations.** A corporation may appeal from a judgment declaring it to be dissolved.[51] But a city cannot appeal from an order refusing to confirm the report of commissioners appointed in a special proceeding for the change of the grade of a street.[52]

[44, 45] Bryant v. Thompson, 128 N. Y. 426, 434.

[46] Isham v. New York Ass'n for Poor, 177 N. Y. 218.

[47] Bliss v. Fosdick, 76 Hun, 508, 510, 27 N. Y. Supp. 1053.

[48] Bockes v. Hathorn, 78 N. Y. 222, which is decided on the theory that it is the trustee's duty to protect and assist real claimants and to see that no real claimant is adjudged to be without right.

[49] Bockes v. Hathorn, 78 N. Y. 222, 225.

[50] Bockes v. Hathorn, 78 N. Y. 222.

[51] Kelsey v. Pfandler Process Co., 19 Abb. N. C. 427, 45 Hun, 10.

[52] Matter of Nepperhan Street, 71 App. Div. 534, 75 N. Y. Supp. 923.

—— **Officers or stockholders of corporation.** Directors of a corporation, as such, cannot appeal from an order directing the receiver of the corporation to bring suit against such directors as the representatives of the corporation, though they might appeal as stockholders.[53]

—— **Receivers.** Where a corporation is dissolved pending an action against it, and the receiver substituted as a party, an appeal may be taken by the receiver in his own name or in that of the corporation.[54] A receiver who has been substituted as a party may appeal though no judgment is entered against him personally.[55] And where the claimants, and not the receiver, apply to the court to obtain a direction that he pay a large sum to such claimants out of the money in his hands, and such application is granted, the receiver is a party aggrieved.[56]

—— **Public officers.** An officer is "aggrieved" by an order commanding him to do an official act which he deems to be a violation of law, so as to be entitled to appeal.[57] For instance, a county treasurer whose decision refusing to issue a liquor tax certificate is reversed, is a party aggrieved and hence may appeal.[58] So commissioners of the land office have been held to be parties aggrieved so as to be entitled to appeal from a reversal of their decision granting title to certain lands, since the reversal interferes with them in the discharge of their duties.[59]

—— **Creditors.** Creditors who become parties to proceedings where property is in the hands of a receiver, executor, assignee, or a like officer, may appeal from a decision affecting their rights.[60]

[53] People v. Commercial Bank, 6 App. Div. 194, 39 N. Y. Supp. 1000.

[54] People v. Troy Steel & Iron Co., 82 Hun, 303, 31 N. Y. Supp. 337.

[55] Honegger v. Wettstein, 47 Super. Ct. (15 J. & S.) 125.

[56] People v. St. Nicholas Bank, 77 Hun, 159, 175, 28 N. Y. Supp. 407.

[57] County clerk. Matter of Cuddeback, 3 App. Div. 103, 39 N. Y. Supp. 388. Receiver of taxes of village. People ex rel. French v. Town, 1 App. Div. 127, 37 N. Y. Supp. 864.

[58] People ex rel. Thomas v. Sackett, 15 App. Div. 290, 44 N. Y. Supp. 593.

[59] People ex rel. Burnham v. Jones, 110 N. Y. 509.

[60] Attorney-General v. North American Life Ins. Co., 77 N. Y. 297; Anonymous, 18 Abb. Pr. 87.

——**Parties to condemnation proceedings.** An objecting landowner cannot appeal from an order in a street opening proceeding which appoints commissioners of estimate and assessment on the property of consenting landowners, since in no way prejudiced thereby.[61]

——**Parties to election contests.** A member of a county committee, who is not a candidate on any ticket, is not aggrieved by an order requiring certain names to be printed on the official ballot as the regular nominees of a party.[62]

§ 2571. Persons entitled to be substituted as parties.

"A person aggrieved, who is not a party, but is entitled by law to be substituted in place of a party, or who has acquired, since the making of the order or the rendering of the judgment appealed from, an interest which would have entitled him to be so substituted if it had been previously acquired, may * * * appeal * * * . But the appeal cannot be heard until he has been substituted in place of the party, and if he unreasonably neglects to procure an order of substitution, the appeal may be dismissed upon motion of the respondent."[63]

This Code section contemplates mainly, if not exclusively, where the party to the record is merely a nominal one and the real party in interest is the one aggrieved because he is the real party; or where, since the judgment or order, there has been, by death or otherwise, a devolution of the entire interests or property involved in the litigation, to some other person who has thus become the person aggrieved.[64] It was intended to apply only to those who, on the record, had no apparent connection with the case.[65] The person must not only be aggrieved but must also be entitled "by law" to be substituted, i. e., must, as a matter of right, be entitled to be substituted.[66] For instance, one appointed a receiver in supple-

[61] Matter of City of New York, 52 App. Div. 478, 65 N. Y. Supp. 77.
[62] Matter of Woodworth, 64 Hun, 522, 19 N. Y. Supp. 525.
[63] Code Civ. Proc. § 1296.
[64] Ross v. Wigg, 100 N. Y. 243.
[65] Hobart v. Hobart, 23 Hun, 484.
[66] People ex rel. Steingoetter v. Erie County Canvassers, 18 State

mentary proceedings is not entitled to be substituted as of right and hence is not entitled to appeal.[67] Before a person can be said to be "aggrieved" by an adjudication, it must have binding force against his rights, his person, or his property.[68] The Code provision relates to the substitution and not the mere addition of a party.[69] The person aggrieved must have in fact been substituted before the appeal can be heard.[70] A person interested in real property, such as a grantee pending an action, which is affected by a judgment, may be made a party to the action after judgment, so as to authorize him to appeal from the judgment.[71]

§ 2572. Persons not parties.

The rule is often laid down that only parties can appeal. This, without modification, is too broad a statement, although formerly it was held that a person not a party to an action, or his representative, could not appeal.[72] As already stated, the Code provides that a "party" aggrieved may appeal. This does not, however, limit the right of appeal to parties to the "action" or "special proceeding" but includes parties to "orders" made in such actions or proceedings.[73] That is, a party to an order who is not a party to the action, while ordinarily not entitled

Rep. 797. In this case a candidate for a political office who had made a motion in mandamus proceedings to compel a canvass of certain votes was held not entitled to appeal.

[67, 68] Ross v. Wigg, 100 N. Y. 243.

[69] People ex rel. Steingoetter v. Erie County Canvassers, 18 State Rep. 797.

[70] Sheffield Farms Co. v. Burr, 13 Misc. 51, 34 N. Y. Supp. 74.

[71] Koehler Co. v. Brady, 82 App. Div. 279, 288, 81 N. Y. Supp. 695.

[72] Martin v. Kanouse, 2 Abb. Pr. 390; Matter of Bristol, 16 Abb. Pr. 397.

[73] Hobart v. Hobart, 86 N. Y. 636, which held that a referee to sell could appeal from an order disallowing fees claimed by him. But in Matter of Griscom, 28 App. Div. 72, 50 N. Y. Supp. 893, an order vacating a subpoena requiring a person to appear before a local commissioner appointed by the Royal Prussian See-Amt, a foreign investigating body, was appealed from by the commissioner, the See-Amt, and the German government. The appeal was dismissed on the ground that none of such persons were parties to the proceedings.

to appeal from the judgment, may appeal from an order affecting him. So the Code provision does not preclude an appeal by persons aggrieved, who, though not strictly parties, are so connected with the litigation that they might be termed quasi parties. Thus, creditors who are given notice to appear on an accounting and prove their debts, and who do so, are entitled to appeal from orders by which they are aggrieved.[74]

Of course, a person not a party and who is in no way connected with the litigation nor bound by the judgment or orders therein cannot appeal. For instance, a taxpayer cannot interpose and appeal in an action in which a judgment has been obtained against the city for damages.[75] So a person not a party against whose property a lis pendens has been filed cannot appeal from an order refusing to vacate such lis pendens.[76]

—— **Purchasers at judicial sales.** Purchasers at judicial sales may appeal from an order setting aside the sale.[77]

—— **Witnesses.** A person examined as a witness in this state under a commission to take testimony to be used in an action in a sister state may appeal from an order requiring him to answer certain questions propounded to him.[78]

—— **Receiver.** A receiver who is not a party to the action in which he is appointed cannot appeal from an order removing him.[79]

—— **Referee.** A referee appointed to sell may appeal from an order fixing his compensation.[80]

—— **Attorneys.** The attorney must himself appeal where he is the person aggrieved by the order appealed from.[81] An

[74] Anonymous, 18 Abb. Pr. 87. Attorney General v. North American Life Ins. Co., 77 N. Y. 297.

[75] Bush v. O'Brien, 164 N. Y. 205, 214.

[76] Walters v. Kraemer, 45 State Rep. 4, 17 N. Y. Supp. 659.

[77] Delaplaine v. Lawrence, 10 Paige, 602; Mortimer v. Nash, 17 Abb. Pr. 229, note.

[78] Matter of Dittman, 65 App. Div. 343, 347, 72 N. Y. Supp. 886. See dissenting opinion of Ingraham, J., concurred in by Laughlin, J. and Van Brunt, J.

[79] Conner v. Belden, 8 Daly, 257.

[80] Hobart v. Hobart, 23 Hun, 484; same point in 86 N. Y. 636.

[81] Pomeranz v. Marcus, 86 App. Div. 321, 83 N. Y. Supp. 711. Right

attorney, though not a party to the action, may appeal from an order refusing his fees on a discontinuance of a divorce suit.[82]

—— **Sureties.** Though not strictly parties, sureties on an injunction bond may appeal from an order confirming the report of a referee to assess the damages sustained by the issuing of the injunction.[83]

—— **Persons examined in supplementary proceedings.** A third person compelled to pay over to the judgment creditor in supplementary proceedings a fund held for the judgment debtor may appeal from such order.[84] But one examined as a third person in supplementary proceedings is not aggrieved by an order appointing a receiver.[85]

§ 2573. Person who has not appealed to intermediate court.

One who has not appealed to the appellate division cannot appeal from the decision of such court to the court of appeals.[86]

of attorney to appeal from decison in favor of his clients, see Matter of Maxwell, 74 Hun, 307, 26 N. Y. Supp. 1114.

[82] Louden v. Louden, 65 How. Pr. 411.

[83] Hotchkiss v. Platt, 7 Hun, 56.

[84] Locke v. Mabbett, 3 Abb. Dec. 68.

[85] Clark v. Savage, 5 Wkly. Dig. 193.

[86] Platt v. Platt, 105 N. Y. 488; Beebe v. Richmond Light, Heat & Power Co., 6 App. Div. 187, 40 N. Y. Supp. 1013.

CHAPTER IV.

WAIVER OF RIGHT TO APPEAL.

General considerations, § 2574.
Agreements, § 2575.
Consent to judgment or order, § 2576.
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—— Acceptance of conditions imposed on adverse party.
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Renewal of motion, § 2588.
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By entering judgment on remittitur, § 2590.

§ 2574. General considerations.

A person entitled to appeal may waive his right to do so either by (a) an express agreement or by (b) the doing of an act or acts inconsistent with an appeal. As an instance of the latter, it is held that the right to appeal from an order consolidating two actions is waived by the receipt, without objection, of an amended complaint in the consolidated action, the service of an offer of judgment in such action, and the stipulating to allow a second amended complaint.[1] The inconsistent act often

[1] Rockefeller v. St. Regis Paper Co., 85 App. Div. 267, 83 N. Y. Supp. 138.

is the acceptance of a benefit under the judgment or order sought to be reviewed on appeal.[2] But to make the acceptance of a benefit under an order operate as a waiver of the right of appeal therefrom, there must be an inconsistency in retaining such benefit and at the same time appealing from the order.[3]

§ 2575. - Agreements.

The right to appeal may be waived by express agreement, evidenced by a writing,[4] and based on some consideration,[5] where the intent to waive the right of appeal is clear.[6] An appellate court has the right to enforce such an agreement between the parties by refusing to entertain an appeal.[7] The right to appeal may be precluded by an agreement which, though not an express waiver of the right of appeal, shows that it was the intention of the parties that the judgment in the trial court should end the contest.[8] But the mere expressing a determination not to appeal does not preclude the right to appeal.[9]

[2] Knapp v. Brown, 45 N. Y. 207. Kraeger v. Warnock, 81 App. Div. 150, 80 N. Y. Supp. 687.

[3] Ziadi v. Interurban St. R. Co., 97 App. Div. 137, 89 N. Y. Supp. 606.

[4] Townsend v. Masterson, S. & S. Stone Dressing Co., 15 N. Y. 587, where it was stipulated that decision of general term of supreme court should be final. That verbal agrement is sufficient, see People v. Stephens, 52 N. Y. 306.

[5] Ogdensburgh & Lake Champlain R. Co. v. Vermont & C. R. Co., 63 N. Y. 176.

[6] Stedeker v. Bernard, 93 N. Y. 589, which held that the provision in an undertaking given on appeal, that if the order was affirmed the appellant would pay the judgment, related to final judgment in the action, and did not preclude the right to appeal to the court of appeals.

[7] Townsend v. Masterson, S. & S. Stone Dressing Co., 15 N. Y. 587, in which case the parties stipulated not to appeal to the court of appeals.

[8] New v. Fisher, 16 Wkly. Dig. 363.

[9] Kilmer v. Bradley, 45 Super Ct. (13 J. & S.) 585, which refused to enjoin the appeal.

§ 2576. Consent to judgment or order.

A judgment [10] or order [11] granted on consent is not appealable. For instance, a party cannot appeal from a judgment amended and corrected and entered on his own motion, which enables him to begin another action for the same cause.[12] So a pro forma order, entered by consent, without a consideration of the merits of the motion, to permit an appeal to the appellate division, is not appealable.[13] But the fact that a party, in order to appeal, is required to move to compel the successful party to enter judgment, does not make the judgment one by consent so as to preclude an appeal.[14] So the fact that a party aggrieved by an order procures to be inserted therein, by amendment and resettlement, matters which he deems essential to the protection of his rights and to a clear presentation to the appellate tribunal of the legal question involved, does not waive his right to appeal therefrom.[15] And counsel who oppose a motion to dismiss an action for want of prosecution in not complying with an order to amend are not to be deemed to consent to such order of dismissal so as to preclude an appeal, merely because they state that sooner than comply with the order they will allow the complaint to be dismissed and present the case on appeal.[16]

[10] Bacon v. Abbey Press, 43 Misc. 345, 350, 87 N. Y. Supp. 165; Alleva v. Hagerty, 32 Misc. 711 (mem.) 65 N. Y. Supp. 690; Peterson v. Swan, 119 N. Y. 662; Finch v. Carpenter, 29 Hun. 268. What constitutes consent to judgment, see De Camp v. McIntire, 115 N. Y. 258; Kam v. Benjamin, 10 App. Div. 419, 42 N. Y. Supp. 99.

[11] Dawson v. Parsons, 74 Hun, 221, 26 N. Y. Supp. 327. If order fails to follow the consent, a motion is proper to vacate it in toto or so much of it as departs from the consent. Bolles v. Cantor, 6 App. Div. 365, 39 N. Y. Supp. 652.

[12] Reichenberg v. Interurban St. R. Co., 45 Misc. 387, 90 N. Y. Supp. 384.

[13] Brown v. Brown, 64 App. Div. 544, 72 N. Y. Supp. 309.

[14] Skinner v. Quinn, 43 N. Y. 99.

[15] Matter of Gall, 47 App. Div. 490, 62 N. Y. Supp. 420.

[16] Lahens v. Fielden, 15 Abb. Pr. 177.

§ 2577. Acceptance of part of judgment or order favorable to appellant.

The acceptance of the benefits of the part of the judgment or order which is favorable to a party precludes an appeal by him from that part which is unfavorable.[17] For instance, except as stated in the next sentence, one granted a favor on certain terms cannot appeal from the order and object to the the terms imposed, after he has availed himself of the privilege conferred by the order.[18] But the acceptance of the relief granted does not preclude an appeal from so much of the order as imposes terms as a condition to granting relief, where the party is entitled, as a matter of right, to the order without terms.[19] Thus, a party on whom illegal terms are imposed as the condition of allowing an adjournment may appeal from such order though he has paid the illegal amount under protest to prevent a dismissal of the complaint.[20] The rule seems to be that where the moving party seeks and obtains relief which he is entitled to as a matter of right and not as of favor, his acceptance of so much of the order as grants his motion does not prevent him from appealing from the order in so far as it improperly denies other relief sought by the motion.[21]

Enforcing provisions of the judgment which are dependent on those appealed from waives the right to appeal.[22]

A party who resists an appeal from the part of the judg-

[17] Harris v. Taylor, 20 Weekly Dig. 359. But see Hyatt v. Ingalls, 49 Super. Ct. (17 J. & S.) 375.

[18] Negley v. Short, 18 Civ. Proc. R. 45, 27 State Rep. 274; Wood v. Richardson, 91 Hun, 332, 36 N. Y. Supp. 1001; Matter of New York, Lackawanna & W. R. Co., 44 Hun, 275. Kraeger v. Warnock, 81 App. Div. 150, 80 N. Y. Supp. 687 Order granting leave to discontinue. Dambmann v. Schulting, 6 Hun, 29. Order granting postponement. Austin v. Wauful, 36 State Rep. 779, 13 N. Y. Supp. 184. Release from arrest. Clafiin v. Frenkel, 29 Hun, 288.

[19] Kennedy v. Wood, 54 Hun, 14, 7 N. Y. Supp. 90. See, also, O'Brien v. Long, 49 Hun, 80, 1 N. Y. Supp. 695; Chapin v. Foster, 101 N. Y. 1.

[20] Kennedy v. Wood, 54 Hun, 14, 7 N. Y. Supp. 90.

[21] Rodbourn v. Utica, Ithaca & E. R. Co., 28 Hun, 369.

[22] Bennett v. Van Syckel, 18 N. Y. 481; Benkard v. Babcock, 25 Super. Ct. (2 Rob.) 175.

ment which is in his favor and secures an affirmance, cannot thereafter appeal from the whole judgment.[23]

——Acceptance of conditions imposed on adverse party. Where a motion is granted, or a judgment reversed, unless the opposing party performs certain acts, the compliance therewith by performing such acts precludes such party from appealing from the order.[24] For instance, where a new trial is granted unless plaintiff stipulates to reduce the amount of his recovery, the giving of such a stipulation precludes the right to appeal from the order.[25] But the right to prosecute an appeal from an order granting a new trial unless plaintiff, within a specified time, stipulates to reduce the amount of the judgment to a named sum, is not, it seems, waived by the act of plaintiff in obtaining a stay of proceedings under the order and an extension of the time to stipulate to twenty days after the determination of the appeal from the order.[26]

§ 2578. Appeal from part of a judgment or order.

An appeal from only a part of an order is the acceptance of the other part and a waiver of the right to appeal therefrom. But this rule applies only where the provisions of the judgment or order are such that the party, by not appealing from a part, enforces or accepts a substantial benefit by reason of that portion not appealed from.[27]

[23] Genet v. Davenport, 60 N. Y. 196. See, also, Id., 59 N. Y. 648; Id., 56 N. Y. 676.

[24] Canary v. Knowles, 41 Hun, 542. National Sav. Bank v. Slade, 17 App. Div. 115, 44 N. Y. Supp. 934. See, also, Matter of O'Brien, 145 N. Y. 379.

[25] Clarke v. Meigs, 23 Super. Ct. (10 Bosw.) 337; Sperry v. Hellman, 36 State Rep. 52, 13 N. Y. Supp. 271.

[26] Cullen v. William E. Uptegrove & Bro., 101 App. Div. 147, 91 N. Y. Supp. 511.

[27] Wallace v. Castle, 68 N. Y. 370, which held that the rule does not apply where an order vacates an attachment on condition that defendant does not sue on the undertakings therein, and plaintiff appeals from so much of the order as vacates the attachment.

§ 2579. Payment.

Payment of the judgment,[28] where such payment is not by way of compromise,[29] or compliance with an "order" to pay,[30] does not preclude the right to appeal. So the payment of costs[31] especially where coerced by execution,[32] does not waive the right to appeal.

§ 2580. Accepting payment.

If the party in whose favor judgment is rendered subsequently accepts payment thereof, he does not thereby waive the right to appeal from it for the purpose of modifying it so as to increase the amount of recovery.[33] In short, the acceptance does not waive the right to appeal where the party accepting would be entitled to retain the amount received in any conceivable disposition of the case.[34] For instance, the receipt by a party to an action for partition of his share of the proceeds of the sale does not necessarily preclude him from appealing from the judgment,[35] except where he might, on a new trial, in case his appeal was successful, recover less than the amount so received.[36]

On the other hand the acceptance of payment in full or in part [37] waives the right to appeal to set aside the judgment in

[28] MacEvitt v. Maass, 64 App. Div. 382, 72 N. Y. Supp. 158; Wells v. Danforth, 1 Code R. (N. S.) 512; Hayes v. Nourse, 107 N. Y. 577; Empire Hardware Co. v. Young, 27 Misc. 226, 57 N. Y. Supp. 753.

[29] Id.

[30] Uhlman v. Uhlman, 51 Super. Ct. (19 J. & S.) 361.

[31] Champion v. Plymouth Cong. Soc., 42 Barb. 441.

[32] Burch v. Newbury, 4 How. Pr. 145.

[33] Seymour v. Spring Forest Cemetery Ass'n, 4 App. Div. 359, 38 N. Y. Supp. 726. Matter of Raber, 4 State Rep. 845; Monnet v. Merz, 43 State Rep. 59, 17 N. Y. Supp. 380; New Rochelle Gas & Fuel Co. v. Van Benschoten, 47 App. Div. 477, 62 N. Y. Supp. 398. To same effect, Higbie v. Westlake, 14 N. Y. (4 Kern.) 281. Benkard v. Babcock, 25 Super. Ct. (2 Rob.) 175.

[34] Alexander v. Alexander, 104 N. Y. 643.

[35] Mellen v. Mellen, 137 N. Y. 606.

[36] Alexander v. Alexander, 104 N. Y. 643, 18 Abb. N. C. 344.

[37] Accepting part payment is a waiver. Hess v. Smith, 16 Misc. 55, 37 N. Y. Supp. 635.

toto.[38] Thus the collecting by execution the amount of a judgment is a waiver of an appeal prosecuted to procure a reversal for alleged error.[39] Where defendant pays into court under a plea of tender, and judgment is rendered for the exact amount tendered, plaintiff cannot, after drawing out the deposit in court, appeal, since by so doing he would be permitted to accept part of the benefit of the judgment and to appeal from the balance.[40]

To constitute a waiver, the acceptance of the money must be by the party or by some one authorized to act in his behalf in regard thereto.[41] Furthermore, the acceptance does not preclude an appeal from a part of the judgment which is separate and independent.[42]

§ 2581. Payment or acceptance of award in condemnation proceedings.

Neither the payment nor the acceptance of an award in condemnation proceedings precludes either party from appealing from the award.[43]

§ 2582. Acceptance of costs.

If the imposition of costs is absolute and not conditional, the receiving the costs does not waive the right to appeal.[44] But where a motion is granted but costs are imposed on the moving

[38] Monnet v. Merz, 43 State Rep. 59, 17 N. Y. Supp. 380.

[39] Knapp v. Brown, 45 N. Y. 207.

[40] Graham v. Sapery, 19 Misc. 690, 44 N. Y. Supp. 1109.

[41] Matter of New York & H. R. Co., 98 N. Y. 12. So acceptance of money paid in pursuance of an order, by receivers, while concluding the receivers personally, does not prevent an appeal by a person made a party by order after judgment of dissolution of the insolvent corporation. People v. Anglo-American Sav. & Loan Ass'n, 60 App. Div. 389, 69 N. Y. Supp. 1054.

[42] Matter of Bogert's Estate, 25 Misc. 466, 55 N. Y. Supp. 751.

[43] Matter of New York & H. R. Co., 98 N. Y. 12.

[44] Matter of Water Com'rs of Amsterdam, 36 Hun, 534; Farmers' Loan & Trust Co. v. Bankers' & Merchants' Tel. Co., 109 N. Y. 342. This applies equally well to costs awarded by a judgment. Seymour v. Spring Forest Cemetery Ass'n, 4 App. Div. 359, 38 N. Y. Supp. 726.

party as a condition of granting the relief, the adverse party waives the right to appeal from the order by accepting such costs.[45] The same rule applies where the defeated party accepts costs awarded by a judgment.[46] This rule is not affected by the fact that subsequently an offer to return such costs is made and refused.[47]

§ 2583. Proceeding with trial.

If an order or interlocutory judgment is entered, the party against whom it is rendered may proceed thereunder, where he neither accepts a benefit therefrom nor enforces it, without waiving his right to appeal therefrom.[48] For instance, the proceeding to try a cause under an order of reference does not waive the right to appeal from such order,[49] especially where the party raises before the referee the objection that the order of reference was unauthorized and states that an appeal will be taken.[50] A fortiori, the proceeding with a reference does not preclude an appeal from the order when it is subsequently modified.[51] So proceeding under an interlocutory judgment, not by enforcing it, but by establishing claims on the reference ordered by it, is not a waiver of the right to appeal from it.[52] So the fact that a party proceeds with the trial, after the denial of a motion to remove the cause to another court does not waive

[45] Radway v. Graham, 4 Abb. Pr. 468; Hood v. Hood, 6 State Rep. 6; Logeling v. New York El. R. Co., 5 App. Div. 198, 38 N. Y. Supp. 1112; Wood v. Richardson, 91 Hun, 332, 36 N. Y. Supp. 1001.

[46] Carll v. Oakley, 97 N. Y. 633.

[47] Platz v. City of Cohoes, 8 Abb. N. C. 392.

[48] Matter of New York Cent. & H. R. R. Co., 60 N. Y. 112; Dey v. Walton, 2 Hill, 403. See, as contra, Mills v. Stewart, 88 Hun, 503, 34 N. Y. Supp. 786.

[49] Brown v. City of New York, 9 Hun, 587; Ubsdell v. Root, 3 Abb. Pr. 142. Contra, Bloom v. National United Ben. Sav. & Loan Co., 81 Hun, 120, 30 N. Y. Supp. 700.

[50] Read v. Lozin, 31 Hun, 286.

[51] Stokes v. Stokes, 87 Hun, 152, 33 N. Y. Supp. 1024.

[52] Otherwise if the party should proceed and enforce payment of such claims. Barker v. White, 58 N. Y. 204

his right to appeal from the order.[53] Likewise, the action of defendant's counsel in appearing and taking part in the examination of a witness does not constitute a waiver of defendant's right to appeal from an order previously made denying a motion to vacate the order for the examination.[54] And an appeal from an order appointing commissioners is not waived by appearing before the commissioners and examining witnesses.[55]

—— **Submission to new trial.** Proceeding with a new trial, it is held, precludes the right to appeal from the order granting the new trial.[56]

§ 2584. Answering after demurrer is overruled and motion is denied.

Pleading over after a demurrer is overruled is a waiver of the right to appeal from the interlocutory judgment entered on overruling the demurrer.[57] So the service of an answer has been held a waiver of the right to appeal from an order denying a motion to compel a separate statement of the several causes of action set forth in the complaint.[58] But the service of an answer after the denial of a motion to make the complaint more definite and certain is not a waiver of the right to appeal from the order denying such motion,[59] nor is the service of an answer a waiver of the right to appeal from an order denying a motion to set aside the summons because of an improper service thereof, where the answer sets up the same fact as a plea to the jurisdiction.[60]

§ 2585. Amendment of pleadings.

Amending after a demurrer to a pleading is sustained is a waiver of the right to appeal from the interlocutory judg-

[53] Leverson v. Zimmerman, 31 Misc. 642, 64 N. Y. Supp. 723.
[54] Osborn v. Barber, 93 N. Y. Supp. 833.
[55] Matter of New York, L. & W. R. Co., 126 N. Y. 632.
[56] Grunberg v. Blumenthal, 66 How. Pr. 62.
[57] Brady v. Donnelly, 1 N. Y. (1 Comst.) 126.
[58] Sixth Ave. R. Co. v. Manhattan R. Co., 54 Super. Ct. (22 J. & S.) 323.
[59] Peart v. Peart, 48 Hun, 79.
[60] McNamara v. Canada S. S. Co., 16 Wkly. Dig. 86.

ment.[61] So a party who obtains leave to amend his pleading cannot appeal from a prior order striking out a portion of his pleading.[62] So the service of an amended complaint, in pursuance of an order dismissing the complaint as to one defendant, waives the right to appeal from such order.[63] But the service of an amended complaint, dropping one of two causes of action on which an attachment has been issued, which attachment had been vacated, from the vacation of which an appeal had been taken, does not waive the right to prosecute such appeal.[64] And the obtaining leave to amend, on a motion to dismiss the complaint, does not waive the right to appeal from the order dismissing the complaint unless plaintiff should amend, where plaintiff does not accept the leave to amend.[65]

§ 2586. Pleading judgment as defense.

Setting up the judgment as a bar to a second action for the same cause is not a waiver of the right to appeal therefrom,[66] nor is the setting it up as a partial defense in an action in which respondent was not a party.[67]

§ 2587. Prosecuting another action on counterclaim.

Bringing another action on a cause of action set up in a counterclaim which has been stricken out does not waive the right to appeal from the order striking it out.[68]

§ 2588. Renewal of motion.

The renewing a motion precludes the right to appeal from the order,[69] though no leave to renew was granted.[70]

[61] McElwain v. Willis, 9 Wend. 548.

[62] Sun Printing & Pub. Ass'n v. Abbey Effervescent Salt Co., 62 App. Div. 54, 70 N. Y. Supp. 871.

[63] City of New York v. Kent, 56 Super. Ct. (24 J. & S.) 133, 4 N. Y. Supp. 802.

[64] Norfolk & New Brunswick Hosiery Co. v. Arnold, 131 N. Y. 553.

[65] Schulsinger v. Blau, 84 App. Div. 390, 82 N. Y. Supp. 686.

[66] Ostrander v. Campbell, 20 State Rep. 806, 3 N. Y. Supp. 597. See, also, Prescott v. Tousey, 49 Super. Ct. (17 J. & S.) 53.

[67] Cornell v. Donovan, 12 State Rep. 117; affirmed in 109 N. Y. 664.

[68] O'Brien v. Smith, 37 State Rep. 43, 13 N. Y. Supp. 410.

§ 2589. Appeal from judgment as waiver of right to appeal from order.

The right to appeal from an order denying a motion to set aside a judgment for irregularity is not waived by appealing from the judgment itself, though it would seem that an appeal from the judgment before moving to set it aside would be a waiver of the motion.[71]

§ 2590. By entering judgment on remittitur.

By entering judgment on a remittitur of the court of appeals, the successful party waives his right to appeal from any part of the order directing the entry of such judgment.[72]

[69] Noble v. Prescott, 4 E. D. Smith, 139; Harrison v. Neher, 9 Hun, 127; Harris v. Brown, 29 Hun, 477.

[70] Harris v. Brown, 93 N. Y. 390.

[71] Kerr v. Dildine, 14 Civ. Proc. R. (Browne) 176, 15 State Rep. 616.

[72] Prentiss v. Bowden, 14 Misc. 185, 35 N. Y. Supp. 653.

CHAPTER V.

PARTIES TO APPEAL.

Designation, § 2591.
Appellants, § 2592.
Respondents, § 2593.
Substitution, § 2594.
—— Personal representatives as respondents.
—— To what court application to be made.
—— Procedure to obtain substitution.
—— Procedure where no order of substitution is obtained.

§ 2591. Designation.

The party or person appealing is designated as the appellant and the adverse party as the respondent.[1] If one other than a party appeals his name is added to the title of the case as appellant, but otherwise the title remains the same.[2]

§ 2592. Appellants.

The question as to who may appeal has been considered,[3] as well as the joinder of appellants.[4]

§ 2593. Respondents.

The determination of the question as to who must be served with the notice of appeal[5] determines the question as to who

[1] Code Civ. Proc. § 1295.

[2] For instance, the title may be as follows: "John Jones, plaintiff v. Richard Smith, respondent. William Brown, appellant." Or (86 N. Y. 636.) "Hobart * * * , respondents, v. * * * Hobart * * * respondents. Delos A. Bellis referee, etc., appellant."

[3] See ante, §§ 2570–2573.

[4] See ante, § 2570.

[5] See post, § 2633.

must be made respondents. Generally speaking, all persons should be made respondents who are interested in sustaining the judgment or order appealed from,[6] and this includes persons not parties of record.[7] Attorneys for the contestants of a will, to whom certain sums are directed to be paid as allowances in lieu of costs, are proper parties to an appeal from such order.[8]

The right of a party to apply for an order directing him to be brought in as a respondent in a pending appeal, taken from a surrogate's decree, is not affected by the fact that the time within which he himself could have appealed therefrom has expired.[9]

§ 2594. Substitution.

A substitution of parties is necessary before the appeal can be heard, (1) where the appeal is taken by one not a party but who is entitled by law to be substituted in place of a party, or who has acquired an interest since the making of the order or the rendition of the judgment appealed from which would have entitled him to be substituted if the interest had been acquired previous thereto; or (2) where the "adverse" party has died before an appeal is taken; or (3) where either party to an appeal dies before the appeal is heard. The first case is provided for by section 1296 of the Code, the second by section 1297, and the third by section 1298. Section 1299 applies to all three of said sections and provides (1) that where the appeal is "from one court to another," an application for an order of substitution must be made "to the appellate court," and (2) that where personal service of notice of application for an order has been made, within the state, on the proper representative of the decedent, an order of substitution may be made, on the application of the surviving party.

[6] Cox v. Schermerhorn, 12 Hun, 411.
[7] Barnes v. Stoughton, 6 Hun, 254.
[8] Peck v. Peck, 23 Hun, 312, 316.
[9] Cox v. Schermerhorn, 12 Hun, 411.

Substitution.

If a sole plaintiff dies pending an appeal to the court of appeals, the appeal cannot be "heard" until substitution of his personal representative.[10]

The death of a party after verdict, report, or decision, as stated in a preceding volume,[11] does not ordinarily abate the action, and hence an appeal may be taken thereafter by the personal representatives of the decedent but they must be substitued before the appeal is heard. Where, after judgment, the plaintiff dies, and the cause of action is one that abates by the death of plaintiff, such as an action to recover damages for personal injuries, the action may be revived, where defendant was successful, to relieve the estate of the plaintiff for liability for costs; but not, it seems, to permit a continuation of the action.[12]

—— **Personal representatives as respondents.** "Where the adverse party has died, since the making of the order, or the rendering of the judgment appealed from, or where the judgment appealed from was rendered, after his death, in a case prescribed by law, an appeal may be taken, as if he was living; but it cannot be heard, until the heir, devisee, executor, or administrator, as the case requires, has been substituted as the respondent. In such a case, an undertaking required to perfect the appeal, or to stay the execution of the judgment or order appealed from, must recite the fact of the adverse party's death; and the undertaking enures, after substitution, to the benefit of the person substituted."[13] This Code provision applies to the case of a death of the "adverse" party "before" the taking of an appeal.

[10] Blake v. Griswold, 104 N. Y. 613. But judgment rendered without knowledge of the court of the death, after exhaustive argument, will not be reiterated after the granting of an order of substitution. Id.

[11] Volume 2, pp. 2100–2103.

[12] Campbell v. Gallagher, 18 Civ. Proc. R. (Browne) 90, 9 N. Y. Supp. 432. See, also, Pessini v. Wilkins, 54 Super. Ct. (22 J. & S.) 146; Corbett v. Twenty-third St. R. Co., 114 N. Y. 579.

[13] Code Civ. Proc. § 1297. Death of lunatic. Matter of Beckwith, 87 N. Y. 503.

Substitution.

—— Form of affidavit on motion to substitute representative as respondent.

[Title of cause.]

[Venue.]

A. X., being duly sworn, says:

I. That he is ———.

II. That on the ——— day of ———, 190—, a judgment was rendered in the above-entitled action by the ——— court, in favor of ———, against ———, for ———, which judgment [14] was entered in the ——— county clerk's office on the ——— day of ———, 190—.

III. That after the rendition and entry of the said judgment, and on the ——— day of ———, 190—, the said ——— died intestate [or died "leaving a last will and testament"].

IV. That ——— was appointed administrator of the property of ———, on the ——— day of ———, 190—, by the surrogate of ——— county, in which county the said ——— resided at the time of his death. [Or as follows: "IV. That said will was admitted to probate on the ——— day of ———, by the surrogate of ——— county, in which county the said ——— resided at the time of his death"].

V. That said ——— appealed from said judgment to the ——— court, on the ——— day of ———, 190—.

[Jurat.] [Signature.]

—— Form of order.

[Title of cause.]

On reading and filing the affidavit of ———, dated the ——— day of ———, 190—, by which it appears that ———; and on reading and filing notice of this motion, with proof of due service thereof on ———; and on reading and filing [name opposing papers, if any]; and after hearing ———, of counsel for ——— in support of the motion, and ———, of counsel for ———, in opposition thereto:

It is hereby ordered that said ——— [describe person substituted], be and hereby is substituted as respondent in the place of said ———, as the respondent in the said appeal brought by said ——— from the said judgment.

—— **To what court application to be made.** Where the appeal is from one court to another, an application for an order of substitution must be made to the appellate court.[15] An ap-

[14] If the appeal is from an order instead of a judgment, state the nature of the order, when made and entered, etc.

[15] Code Civ. Proc. § 1299.

peal to the appellate division from a judgment rendered by the supreme court is not, within this section, an appeal "from one court to another," but in such case the motion should be made at special term.[16]

——**Procedure to obtain substitution.** The Code chapter on appeals does not prescribe how the substitution shall be had or name the person to be substituted, and hence the procedure is to be governed by the practice in the trial courts, as laid down in a preceding volume.[17] Where an order to show cause is obtained under section 1298 and on the return day proof is made of its service and that no parties have been substituted, but in opposition one of the heirs produced an affidavit and a notice of motion, with proof of service, to substitute himself as a party, the court may allow a substitution on terms and affirm the judgment as to the heirs who fail to move for substitution.[18] Substitution will not be ordered in the court of appeals merely because the party asking it has obtained a judgment of the court below, in a cross action, declaring him entitled to be substituted as plaintiff and to control the action, where an appeal is pending from such judgment.[19]

Since all orders of substitution, both of parties and of attorneys, after an appeal to the court of appeals, should be obtained from the court of appeals, it is desirable that the returns in causes in which a substitution is to be entered before hearing be transmitted to the clerk before application for substitution be made. The order of substitution, when made, can then be attached to the record, and be properly entered in the register of the cause which is opened on the receipt of the return. If an order of substitution is obtained in the court below after appeal perfected, a copy should be transmitted to the court of appeals with the return. An order of substitution

[16] Campbell v. Friedlander, 51 App. Div. 191, 64 N. Y. Supp. 241.

[17] Personal representative may be substituted. People ex rel. Fairchild v. Commissioners of Dept. of Fire & Bldgs., 105 N. Y. 674. Assignee may be substituted in place of deceased assignor. Riley v. Gitterman, 24 Abb. N. C. 89, 10 N. Y. Supp. 38.

[18] Van Horne v. France, 32 Hun, 504.

[19] Glenville Woolen Co. v. Ripley, 11 Abb. Pr. (N. S.) 87.

obtained in the court below after appeal perfected and return transmitted, a copy of which is sent to the clerk of the court of appeals, is not considered a part of the record of the cause, and is not noted in the remittitur, as are orders of substitution obtained in the court of appeals after return filed. On receipt of consents for substitution, properly signed, orders are entered accordingly, by the clerk, as of course.[20]

—— **Procedure where no order of substitution is obtained.** "Where either party to an appeal dies before the appeal is heard * * * , if an order substituting another person in his place is not made within three months after his death * * * , the court, in which the appeal is pending, may, in its discretion, make an order requiring all persons interested in the decedent's estate to show cause before it why the judgment or order appealed from should not be reversed or affirmed, or the appeal dismissed, as the case requires. The order must specify a day when cause is to be shown, which must not be less than six months after making the order; and it must designate the mode of giving notice to the persons interested. Upon the return day of the order, or at a subsequent day, appointed by the court, if the proper person has not been substituted, the court, upon proof, by affidavit, that notice has been given as required by the order, may reverse or affirm the judgment or order appealed from or dismiss the appeal, or make such further order in the premises as justice requires." [21]

Where a person aggrieved, entitled by law to be substituted as a party, "unreasonably neglects to procure an order of substitution the appeal may be dismissed, on motion of the respondent." [22]

—— **Form of affidavit for order to show cause.**

[Title of cause.]
[Venue.]
A. X., being duly sworn, says:
I. That he is ———.

[20] Smith, Ct. of App. Pr. 43.
[21] Code Civ. Proc. § 1298. See Carr v. Rischer, 119 N. Y 117. Mapes v. Knorr, 47 App. Div. 639, 62 N. Y. Supp. 303.
[22] Code Civ. Proc. § 1296.

II. That on the ——— day of ———, 190—, an appeal was taken by ——— from judgment of the ——— court, entered in the above-entitled action on the ——— day of ———, for ———, in favor of ——— against ———.[23]

III. That said ———, the appellant, [or "respondent"] died on the ——— day of ———, 190—, before any hearing had been had of said appeal.[24]

IV. That the following are all the persons interested in the estate of said ———, so far as can be ascertained by deponent, to-wit: ———. That the inquiries made to ascertain who are the persons interested in said estate are as follows: ———

V. That no order has been made substituting any other person in the place of ——— in said appeal.

[Jurat.] [Signature.]

——— Form or order to show cause.

[Title of cause.] At a special term, etc.

On reading and filing the affidavit of ———, dated the ——— day of ———, showing [state, in substance, contents of affidavit as to taking of appeal, death of party pending appeal, and the failure to obtain an order of substitution.]

It is hereby ordered that all persons interested in the estate of said ——— show cause before this court, at a term thereof, to be held at ———, on the ——— day of ———, 190—, why the said judgment (or order) should not be affirmed [or "reversed" or "why the appeal from the said judgment (or order) should not be dismissed"].[25]

And it is further ordered that a copy of this order and a copy of said affidavit be served on [name persons to be served] by [state manner of service], on or before the ——— day of ———, 190—.

——— Form of order on return of order to show cause.

[Title of cause.] At a special term, etc.

An order having been hereuntofore made and entered in this action on the affidavit of ———, dated the ——— day of ———, 190—, at a special term of this court, held at ——— on the ——— day of ———, 190—, that all persons interested in the estate of ——— show cause at this term why the judgment (or order) entered in this action on the

[23] If the appeal is from an order instead of a judgment, state the nature of the order, when made and entered, etc.

[24] Death must have been more than three months before motion.

[25] Day designated must be not less than six months after making the order.

Substitution.

———, 190—, should not be affirmed [or "reversed" or "appeal dismissed"]; and on reading (name opposing papers, if any); and on proof by the affidavit of ——— of service of said order to show cause and the affidavits on which such order was founded, on ———, on or before the ——— day of ———, 190—, as prescribed in said order; and on motion of ———, attorney for ———, and after hearing ———, attorney for ———, in opposition thereto:

It is hereby ordered that the said judgment (or order) be, and the same hereby is, affirmed [or "reversed" or that "the appeal from said judgment (or order) be and the same hereby is dismissed"].

CHAPTER VI.

TIME TO APPEAL.

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ART. I. GENERAL CONSIDERATIONS.

§ 2595. Resume of Code provisions.

The following table is a compilation of the Code provisions relating to the time to appeal to the court of appeals, or to the appellate division from the supreme court, or to the supreme court from an inferior court:

Kind of Appeal.	To Court of Appeals.	To Appellate Division from Supreme Court.	To Supreme Court from Inferior Court.
I. From judgment.	1 year after entry of judgment on decision of appellate division.	30 days from service of copy and notice of entry.	30 days from service of copy and notice of entry.
II. From order in action.	60 days from service of copy and notice of entry.	30 days from service of copy and notice of entry.	60 days from service of copy and notice of entry.
III. From order in special proceeding.	60 days from service of copy and notice of entry.	30 days from service of copy and notice of entry.	30 days from service of copy and notice of entry.

§ 2596. Disabilities as preventing running of time.

The Codes of many states provide that the limitation of the time for taking an appeal shall not run against persons under certain legal disabilities, such as infants, lunatics, married women, nonresidents, convicts, etc., but no such rule prevails in this state.

§ 2597. Expiration of time to appeal from judgment as affecting right to appeal from order, and vice versa.

An appeal may be taken from an order denying a new trial though the time to appeal from the judgment has expired.[1] And, on the other hand, the right to review an interlocutory judgment or an intermediate order, on an appeal from a judgment, where the notice of appeal specifies such judgment or order, is not affected by the expiration of the time within which a separate appeal therefrom might have been taken.[2]

§ 2598. Premature appeals.

An appeal cannot be taken from a judgment [3] or order [4] until it has been duly entered with the proper clerk. A fortiori, no appeal can be taken until the judgment or order is complete. For instance, where a judgment awards costs, notice served prior to the taxation and entry of the costs does not limit the time for appeal,[5] unless a notice of waiver of costs is served with a copy of the judgment with notice of its entry;[6] but where costs are taxed without notice and notice of retaxation at once given, and the amount entered in the judgment by the clerk, the notice to limit the time to appeal is not premature though afterwards, on retaxation, the costs are changed,[7]

[1] Whitman v. Johnson, 10 Misc. 725, 31 N. Y. Supp. 1009; Harnett v. Westcott, 14 Civ. Proc. R. (Browne) 360, 2 N. Y. Supp. 10.

[2] Code Civ. Proc. § 1316.

[3] Leavy v. Roberts, 8 Abb. Pr. 310. The court may direct that unless the successful party enter judgment within a specified time, the defeated party may do so. Wilson v. Simpson, 84 N. Y. 674; Knapp v. Roche, 46 Super. Ct. (14 J. & S.) 200.

[4] Gailt v. Finch, 24 How. Pr. 193. Order made out of court must first be entered. Code Civ. Proc. § 1304. That denial of motion for new trial can not be reversed unless order is made and entered, see vol. 3, p. 2740.

[5] Thurber v. Chambers, 60 N. Y. 29; Sherman v. Wells, 14 How. Pr. 522. In the latter case, taxation of costs was adjourned to a certain day but on the day before such day, by mistake, the costs were taxed, judgment entered, and notice given.

[6] Beinhauer v. Gleason, 44 Hun, 556.

[7] Hewitt v. City Mills, 136 N. Y. 211. The case of De Mott v. Kendrick, 63 Hun, 112, 17 N. Y. Supp. 630, is not the law now.

since the Code expressly provides in such a case [8] that the judgment is not to be changed but that the amount of the reduction is to be credited on the execution.

A decision of a special term, made during the trial of an action, cannot be reviewed on appeal until the trial has been concluded and a decision made, signed, filed and excepted to.[9] Where final judgment is entered on a memorandum opinion, before the filing of a decision, the case may be remitted so that a formal decision may be made, but not where the trial judge is no longer in office as a trial judge.[10]

If there are several appeals to the appellate division, from the same judgment, an appeal to the court of appeals is premature if taken before all the appeals are heard and disposed of by the appellate division.[11]

—— **Procedure when order made by judge out of court has not been entered.** The Code expressly provides that no appeal can be taken from an order made by a judge out of court, until it has been entered in the office of the proper clerk.[12] However, the indorsement by the county clerk of the word "filed," as of a certain date, on an order made by a judge out of court, is equivalent to an entry thereof.[13]

Where an order made by a judge out of court has not been entered in the office of the proper clerk, or the papers upon which it was founded have not been filed in the same clerk's office, the judge who made it, or, if he is absent or unable, or disqualified to act, a judge of the court in or to which an appeal therefrom may be taken must, upon the application of a party or other person entitled to take such an appeal, make an order, requiring the omission to be supplied within a specified time after service of a copy of the order made by him.[14]

This order may be made upon an ex parte application. The

[8] See vol. 3, p. 3039.
[9] Dickson v. Knapp, 17 App. Div. 36, 44 N. Y. Supp. 636.
[10] Burnham v. Denike, 54 App. Div. 132, 66 N. Y. Supp. 396.
[11] Muldoon v. Pitt, 54 N. Y. 269, 274.
[12] Code Civ. Proc. § 1304.
[13] O'Connor v. McLaughlin, 80 App. Div. 305, 80 N. Y. Supp. 741.
[14] Code Civ. Proc. § 1304.

motion should be based on an affidavit showing the prior application to the judge; the papers on which the application was made and opposed; the making of an order thereon stating generally its nature; that such order has not been entered in the office of the proper clerk; or, if so entered, that the papers on which it is founded have not been filed in such office, and that the moving party is thereby prevented from appealing therefrom. If the moving party is not a party of record, and his right to take such appeal does not otherwise appear, enough should be stated in the moving affidavit to show at least a presumptive right to appeal.[15] A copy of this order and of the affidavit on which it was granted should be served on the attorney for the adverse party.[16]

On proof, by affidavit, that a copy of the order requiring the entry of the original order has been served, and that the omission has not been supplied, the same judge may make, on notice, an order revoking and annulling the original order.[17] Service of the order, or notice, should be on the attorney for the adverse party. If, for any reason, the attorney cannot be served, the service should be as provided for by section 1302 of the Code.

—— Form of affidavit to procure order requiring entry of original order.

[Title of cause.]

[Venue.]

A. X., being duly sworn, says:

I. That he is ———.

II. That an order, made in the above-entitled action on the ——— day of ——— by Hon. ———, judge of ———, on [state motion papers and opposing papers], requiring ——— to [state nature of order], has not been entered in the office of the clerk of ——— county, as will more fully appear from the certificate of said clerk, which is hereto annexed.

III. That the place of trial, designated in the complaint in said action, is said county of ———.

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[15] Baylies, New Trials & Appeals (2nd Ed.) 152, 153.

[16] Section 1304 provides that if service can not be made on such attorney, the service should be according to section 1302 of the Code as set forth in section 2634 of this work.

[17] Code Civ. Proc. § 1304.

IV. That ——— desires to have said order entered in order that he may take an appeal therefrom.

[Jurat.] [Signature.]

—— Form of order.

[Title of cause.]

It appearing to me, by the affidavit of ———, dated the ——— day of ———, 190—, that the order made by ———, in this action, on the ——— day of ———, 190—, requiring ———, has not been entered in the proper county clerk's office, i. e., the ——— county clerk's office;

I do hereby order and direct that said order be entered by the attorney for ———, in said clerk's office, within ——— days after service on him of a copy of this order.

§ 2599. Extension of time.

In this state, there is no power in the court to relieve a party who wholly fails to take an appeal in due time, however meritorious his excuse,[18] except where a party entitled to appeal has died before the right to appeal expired, and except that where the notice of appeal is filed in due time on the clerk, it may, in specified cases, be served on all or a part of the adverse parties after the time to appeal has expired.[19] The Code expressly provides that the time for taking an appeal cannot be enlarged by the court when it is statutory.[20] What the court cannot do directly it cannot do indirectly.[21] It follows that a motion to set aside a judgment does not extend the time to appeal therefrom,[22] and the court cannot set aside a judgment to enable a party to take an effectual appeal, when the time to appeal has expired.[23] So the order appealed from can-

[18] Kelly v. Sheehan, 76 N. Y. 325.

[19] See post, § 2633.

[20] Code Civ. Proc. § 784; Hall v. City of New York, 79 App. Div. 102, 108, 79 N. Y. Supp. 979.

[21] Renouil v. Harris, 4 Super. Ct. (2 Sandf.) 641. But correcting of errors in giving security is not enlarging the time to appeal. Aldrich v. Ketchum, 12 N. Y. Leg. Obs. 319.

[22] Renouil v. Harris, 4 Super. Ct. (2 Sandf.) 641; Bishop v. Empire Transp. Co., 37 Super. Ct. (5 J. & S.) 17.

[23] Whitney v. Townsend, 7 Hun, 233; Parsons v. Winne, 17 Wkly. Dig. 236.

not be resettled after the time to appeal therefrom has expired.[24]

Likewise, an amendment or modification of the judgment or order does not extend the time to appeal unless it relates to a material matter as distinguished from a mere irregularity which, when corrected or supplied, does not change the character of the judgment or order.[25] For instance, the time to appeal from an order, a copy of which has been served, where immediately after its entry and service, notice of a motion to resettle it in a substantial particular is given, does not begin to run until the determination of the application to resettle.[26] So where an order required modification in a material matter, and several days were occupied in its correction, the fact that the corrected order was made to take effect nunc pro tunc will not make the time to appeal run from the service of a copy of the original order and notice of its entry.[27] The fact that costs awarded by the judgment were afterwards corrected does not extend the time to appeal.[28]

So an order staying proceedings on the judgment does not enlarge the time within which to appeal.[29] So the substitution of parties does not affect the running of the time, where not expressly provided otherwise by statute.[30] So a notice of appeal cannot be amended as to make it effectual as an appeal from an order or judgment not referred to in the original notice of appeal, where the time to appeal from such order or judgment has expired.[31]

The time to appeal from a judgment is not extended by a

[24] Stierle v. Union R. Co., 11 Misc. 124, 31 N. Y. Supp. 1008.

[25] The remedy of the aggrieved party usually is to appeal from the order of modification or amendment. Hubbard v. Copcutt, 9 Abb. Pr. (N. S.) 289. See, also, Matter of Beckwith, 87 N. Y. 503, 507.

[26] Weeks v. Coe, 36 App. Div. 339, 341, 55 N. Y. Supp. 263.

[27] Kubin v. Miller, 61 N. Y. Supp. 1121.

[28] Wilson v. Palmer, 75 N. Y. 250.

[29] Renouil v. Harris, 2 Code R. 71.

[30] Brown v. City of New York, 9 Hun, 587, 590.

[31] See post, § 2638.

motion for a new trial, unless a stay of proceedings is obtained before the entry of judgment.

Granting an extension of time to make a case does not extend the time to appeal.[32]

Where a decision on appeal was held a nullity because the court had no authority to hear it but the party who recovered the original judgment had taken no steps to enforce it for some nine years, he may be restrained from enforcing it unless he consents to allow an appeal as if brought within the time prescribed by law.[33]

—— **By stipulation.** In most of the states the time to appeal cannot be extended by a stipulation of the parties but the rule is otherwise in this state.[34] However, a stipulation extending the time to serve a case which does not in terms extend the time to appeal does not also extend the time to serve a notice of appeal.[35]

—— **Death of party entitled to appeal.** Where a party entitled to appeal dies before the expiration of the time within which the appeal may be taken, the court may allow the appeal to be taken by the heir, devisee or personal representative of the decedent, at any time within four months after his death.[36]

§ 2600. Computation of time.

The general rules as to computation of time, as laid down in a preceding volume,[37] apply.[38] If the day on which the limit for an appeal would ordinarily have expired is a public

[32] Durrant v. Abendroth, 53 Super. Ct. (21 J. & S.) 15.

[33] Jacobs v. Morange, 1 Daly, 523.

[34] Bagley v. Jennings, 58 Hun, 56, 11 N. Y. Supp. 386; Jacobs v. Morange, 1 Daly, 523.

[35] Salls v. Butler, 27 How. Pr. 133; Durant v. Abendroth, 8 Civ. Proc. R. (Browne) 87.

[36] Code Civ. Proc. § 785.

[37] Volume 1, p. 694.

[38] See Mason v. Jones, 1 Code R. (N. S.) 335; Gallt v. Finch, 24 How. Pr. 193.

holiday and the next day is Sunday the time does not expire until Monday.[39]

§ 2601. Procedure where appeal not taken in time.

If notice of appeal is served too late, it should be immediately returned with an indorsement of the reason therefor. Returning the notice of appeal, indorsed with the reason for the return, is sufficient, where it is served too late, though other papers subsequently served, including copies of the printed case, are retained.[40] An appeal not taken within the prescribed time will be dismissed on motion provided the objection has not been waived.[41]

—— **Waiver of objection.** An admission of due service of the notice of appeal, where the notice is not served until after the time to appeal has expired, is effectual as a waiver if the notice has been filed with the clerk in time, but not otherwise.[42] So an appearance in the appellate court, and submitting points on the merits, though including a protest against the jurisdiction of the court,[43] or the admission of due service of the notice of argument of the appeal, and the allowing two terms of court to pass without moving to dismiss the appeal,[44] or the noticing the appeal for argument,[45] have been held to waive the right to object that the notice of appeal was not served in time.

ART. II. NOTICE TO LIMIT TIME TO APPEAL.

§ 2602. Necessity.

There is no limit on the time to appeal, except to the court of appeals from a final judgment, unless notice of the judg-

[39] Lucia v. Omel, 53 App. Div. 641, 66 N. Y. Supp. 1136. Same point, Id., 46 App. Div. 200, 61 N. Y. Supp. 659.

[40] Marsh v. Pierce, 110 N. Y. 639.

[41] Goetz v. Metropolitan St. R. Co., 54 App. Div. 365, 367, 66 N. Y. Supp. 666.

[42] Waring v. Senior, 48 How. Pr. 226.

[43] Pickersgill v. Read, 7 Hun, 636, 640.

[44] Stubbs v. Stubbs, 11 Wkly. Dig. 243.

[45] Pearson v. Lovejoy, 53 Barb. 407.

ment or order appealed from is given by the successful party.[46] This notice must be a written notice.[47] The notice is necessary even though the appeal is taken from a judgment or order entered by the appellant himself,[48] or the appellant has procured a copy of the order entered,[49] since notice of the entry of the judgment or order appealed from is necessary though the defeated party already possesses all the knowledge which would be conveyed to him by such written notice.[50]

§ 2603. Who must serve.

The notice must be served by the attorney for the successful party, i. e., the party who will oppose a modification or reversal on appeal.[51] Service of notice by the attorney for the "defeated" party on the attorney for the "successful" party, does not limit the time to appeal.[52]

Notice of entry served on behalf of the successful plaintiff on the attorney for all the defendants limits the time to appeal by a defendant as against his co-defendant, and it is not necessary that notice be given in behalf of such co-defendant.[53] A defendant successful as against a co-defendant need not serve a copy of the judgment on the latter, with notice of its entry, to limit the latter's time to appeal, except in cases where cross-answers have been served between defendants and judgment is entered in favor of one defendant against another.[54]

[46] Except as stated, mere lapse of time, where no notice is served to limit the time to appeal, does not bar the right to appeal. Anderson v. Carter, 24 App. Div. 462, 49 N. Y. Supp. 255.

[47] Fry v. Bennett, 7 Abb. Pr. 352.

[48] Rankin v. Pine, 4 Abb. Pr. 309. Cited with approval in Matter of New York Cent. & H. R. R. Co., 60 N. Y. 112 and followed in New Rochelle Gas Co. v. Van Benschoten, 47 App. Div. 477, 62 N. Y. Supp. 398.

[49] Fry v. Bennett, 7 Abb. Pr. 352.

[50] Staring v. Jones, 13 How. Pr. 423.

[51] Kilmer v. Hathorn, 78 N. Y. 228. Kubin v. Miller, 61 N. Y. Supp. 1121; Fry v. Bennett, 7 Abb. Pr. 352.

[52] McGruer v. Abbott, 47 App. Div. 191, 62 N. Y. Supp. 123.

[53] Morrison v. Morrison, 16 Hun, 507.

[54] Fairchild v. Edson, 81 Hun, 80, 30 N. Y. Supp. 615.

§ 2604. Person to be served.

To limit the time for appeal, the service of the copy of the judgment or order, where necessary, must be made on the attorney for the appellant,[55] except that where the appeal is from a final order in a special proceeding and the appellant has not appeared by attorney the service may be on the appellant personally.[56]

Serving notice on an attorney who has made an unauthorized appearance is not sufficient,[57] but service on a firm of attorneys who gave an admission in the name of the attorney of record, which they were authorized to do, is sufficient, especially where they had had nearly the exclusive management of the case.[58]

§ 2605. Service by mail.

Service of notice by mail is effectual though the notice is not received.[59]

§ 2606. Sufficiency of notice.

The courts favor the right of appeal. It follows that a party will not be held deprived of his right to appeal by the lapse of time unless the successful party has strictly complied with the Code provisions allowing him to limit the time within which the defeated party can appeal.[60] But while strict compliance with the statutes is required to limit the time of a party to appeal, yet the statute should not be so rigidly con-

[55] Code Civ. Proc. §§ 1325, 1341, 1343, 1351, 1359. Fry v. Bennett, 7 Abb. Pr. 3525. On appeal from final order in special proceeding, service may be on the attorney in fact of the appellant if he appeared by such an attorney. Id. § 1359.

[56] Code Civ. Proc. § 1359.

[57] Bates v. Voorhees, 20 N. Y. 525, 529.

[58] Chase v. Bibbins, 71 N. Y. 592.

[59] Miller v. Shall, 67 Barb. 446. Service by mail gives double time to serve the notice of appeal. See vol. 1, p. 662.

[60] Pickersgill v. Read, 7 Hun. 636; De Mott v. Kendrick, 63 Hun. 112, 17 N. Y. Supp. 630; Livingston v. New York El. R. Co., 60 Hun, 473, 15 N. Y. Supp. 191.

strued as to nullify its object or to make it difficult of application.[61]

Service of a copy of the judgment or order appealed from, with written notice of the entry thereof, is required. The notice of entry is usually indorsed on the copy of the judgment or order served. It must be a "written" notice.[62] Service of a copy of an order or judgment, without notice of the entry of the original, is not sufficient.[63]

The notice must be so given that the attention of the party served cannot fail to be arrested by it. If it is served in connection with another paper, it must be so placed that it cannot fail to be observed if the papers are examined. The notice must be so given that failure to observe it would constitute negligence.[64] Thus, the notice is not sufficient where indorsed on the back of a cover and the cover is so folded that the notice is not observable unless the cover is opened and read on the back.[65]

—— **Stating time and place of entry of judgment or order.** The notice must state when and where the judgment or order appealed from was entered. It must state the county where entered and the clerk with whom entered.[66] It is not sufficient where the date of the entry of the judgment was omitted, though such date was contained in other papers served.[67] There is a conflict in the decisions as to whether a notice that a judgment has been duly "filed" instead of entered is sufficient notice of entry thereof.[68]

—— **Statement as to nature of judgment or order appealed from.** The reference in the notice to the judgment or order

[61] Guarantee Trust Co. v. Philadelphia, R. & N. E. R. Co., 160 N. Y. 1.

[62] See ante, § 2602.

[63] Kubin v. Miller, 61 N. Y. Supp. 1121.

[64] Weeks v. Coe, 36 App. Div. 339, 342, 55 N. Y. Supp. 263.

[65] Weeks v. Coe, 36 App. Div. 339, 342, 55 N. Y. Supp. 263.

[66] Walton v. National Loan Fund Life Assur. Soc., 19 How. Pr. 515; Livingston v. New York El. R. Co., 60 Hun, 473, 15 N. Y. Supp. 191.

[67] Curtis v. Ritzman, 7 Misc. 400, 27 N. Y. Supp. 971.

[68] That it is, see Mohr v. Dorschel, 15 Civ. Proc. R. 22. That it is not, see Gabay v. Doane, 38 Misc. 661, 78 N. Y. Supp. 224.

appealed from must not vary from such judgment or order. For instance, a notice stating that the copy is of an order "made" and entered on a certain day is insufficient to start the time running where the order itself shows that it was made several days before the day specified.[69] So a notice of entry of "order of judgment" is insufficient as notice of entry of an order denying a motion for a new trial.[70]

—— **Signature.** The notice of entry of judgment does not limit the time within which to appeal where neither the copy of the judgment served nor the notice of entry was indorsed or subscribed with the name of the attorney and his office address or place of business;[71] though it is not necessary that the attorney's name and address be subscribed to the notice if it appears from the copy of the order or judgment.[72]

—— **Copy of judgment or order.** Notice of entry of the judgment or order appealed from is not, of itself, sufficient. There must be served, in addition, a copy of such judgment or order.[73] The copy of a judgment served must be attested by the clerk.[74] It is insufficient where neither signed by the clerk nor containing any amount of costs inserted therein.[75] But it is not necessary that the copy served should be certified by the clerk to be a true copy.[76] And where the copy served is not

[69] Weeks v. Coe, 36 App. Div. 339, 342, 55 N. Y. Supp. 263.

[70] Wunch v. Shankland, 59 App. Div. 482, 69 N. Y. Supp. 349.

[71] Langdon v. Evans, 29 Hun, 652; Kelly v. Sheehan, 76 N. Y. 325; Sheridan v. Andrews, 81 N. Y. 650; Forstmann v. Shudting, 107 N. Y. 644.

[72] Harnett v. Westcott, 56 Super. Ct. (24 J. & S.) 129, 14 Civ. Proc. R. 360, 2 N. Y. Supp. 10.

[73] Rollins v. Wood, 16 Hun, 586. Service of certified copy of the order bearing the words "copy order, etc.," indorsed, is sufficient. Baker v. Hatfield, 3 Civ. Proc. R. 303. Notice is sufficient where a copy of the order is set out in full, is certified to by the clerk as a correct copy, and it shows that it has been entered. Devlin v. City of New York, 62 How. Pr. 166.

[74] Good v. Deland, 119 N. Y. 153. Livingston v. New York El. R. Co., 60 Hun, 473, 15 N. Y. Supp. 191.

[75] Mason v. Corbin, 29 App. Div. 602, 51 N. Y. Supp. 178.

[76] Levien v. Webb, 30 Misc. 742, 63 N. Y. Supp. 155.

folioed, the party must return it with notice of the irregularity. He cannot retain it and then claim that the service was ineffectual to limit his time to appeal.[77] The copy of judgment served is insufficient where it differs from the original as to its date and as to the presence of a seal, and the copy is signed "Thos. ———" while the original is signed "Thomas ———."[78]

—— Form of notice of entry of judgment.

[Title of cause.]

Please take notice that the judgment in this action, of which the within is a copy, was entered in the office of the clerk of the county of ———, on the ——— day of ———, 190—.

[Date.]

[Signature and office address of attorney for successful party.]

[Address to attorney for opposing party.]

—— Form of notice of entry of order.

[Title of cause.]

Please take notice that the within order, made in the above-entitled action is a copy of an order of the ——— court entered in the ——— county clerk's office on the ——— day of ———, 190—.

[Date, address, and signature as in preceding form.]

—— Waiver of objections. An appellant who has admitted due and timely service of a judgment and notice of its entry cannot afterward claim that there was any irregularity in the contents of the notice of entry.[79]

§ 2607. Effect where served after proceedings are stayed.

After a party's proceedings have been stayed, his entry of judgment and service of notice thereof is a nullity and will not limit the time to appeal[80] although, as already stated, a stay

[77] New York City Baptist Mission Soc. v. Tabernacle Baptist Church, 9 App. Div. 527, 41 N. Y. Supp. 720.

[78] Gabay v. Doane, 38 Misc. 661, 78 N. Y. Supp. 224.

[79] Mohr v. Dorschel, 15 Civ. Proc. R. 22, 16 State Rep. 766.

[80] Kerner v. Steck, 18 Civ. Proc. R. (Browne) 9 N. Y. Supp. 303. In such case it is proper for the court to set aside the notice of entry of judgment. Id.

of proceedings after judgment does not extend the time to appeal.

§ 2608. New notice.

If, after notice is given, the judgment is materially amended, even where nunc pro tunc, a new notice is necessary to limit the time to appeal from the amended judgment.[81]

ART. III. TO COURT OF APPEALS.

§ 2609. Appeal from final judgment.

An appeal to the court of appeals, from a final judgment, must be taken within one year after final judgment is entered on the determination of the appellate division and the judgment roll filed.[82] For the purpose of limiting the time to appeal, judgment must be entered on the decision of the appellate division.[83] Where an appeal is taken to the appellate division from a judgment and from an order denying a new trial, and it affirms both the judgment and the order, an appeal taken before the entry of the judgment of affirmance, is nugatory not only as an appeal from the judgment but also as an appeal from the order of the appellate division in so far as it affirms the order denying a new trial.[84]

All that the successful party has to do is to enter his judgment and file the judgment roll. No notice of such entry need be given to limit the time to appeal.[85]

—— **Cross appeals.** If the respondent, on appeal from a final judgment as provided for in section 1350 of the Code,

[81] Smith v. Evans, 1 Abb. N. C. 396. New notice need not be served, however, where there is merely an order allowing a modification, without an actual modification. Wilson v. Palmer, 75 N. Y. 250.

[82] Code Civ. Proc. § 1325. Fractions of a day will not be counted where appeal is taken on same day, but before, the judgment roll is filed. Blydenburgh v. Cotheal, 4 N. Y. (4 Comst.) 418.

[83] Knapp v. Roche, 82 N. Y. 366; Robinson v. Govers, 138 N. Y. 425, 430.

[84] Derleth v. De Graff, 104 N. Y. 661.

[85] Marsh v. Pierce, 110 N. Y. 639.

elects to bring up for review the determination of the appellate division affirming an interlocutory judgment, or refusing a new trial, as the case may be, he may take a cross appeal therefrom, notwithstanding the expiration of the time to take an original appeal therefrom.[86]

§ 2610. Appeal from order.

An appeal to the court of appeals from an order must be taken within sixty days after service, upon the attorney for the appellant, of a copy of the order appealed from and a written notice of the entry thereof.[87]

The general rules, already considered,[88] as to the necessity [89] and sufficiency [90] of the notice, apply. Service of a copy of an order of the appellate division, with notice of its entry in the office of the county clerk, though in fact the order was entered with the clerk of the appellate division, and a certified copy filed with the county clerk, is sufficient.[91] The time to appeal from an order of the appellate division granting a new trial does not begin to run from the time such order is entered and notice given of its entry, where the judgment of reversal is not then entered. The time does not begin to run until both are entered, together or separately, and notice thereof given. In other words, notice of entry of an order granting a new trial, on a reversal by the appellate division, does not start the time to running within which an appeal can be taken,

[86] Code Civ. Proc. § 1350.

[87] Code Civ. Proc. § 1325. Applies to final order in certiorari proceedings. People ex rel. Walkill Valley R. Co. v. Keator, 101 N. Y. 610. Review on appeal from final judgment, of interlocutory judgment or intermediate order, though time to appeal therefrom has expired, see ante, § 2597.

[88] See ante, §§ 2602, 2606.

[89] Knowledge of the order will not limit the time for appealing. Matter of New York Cent. & H. R. R. Co., 60 N. Y. 112.

[90] Service of a copy of a report is not sufficient. Matter of New York Cent. & H. R. R. Co., 60 N. Y. 112. Notice must refer to entry of order.

[91] Guarantee Trust & Safe Deposit Co. v. Philadelphia, R. & N. E. R. Co., 160 N. Y. 1.

but the time does not begin to run until the judgment of reversal is also entered.[92]

—— **Where leave to appeal is necessary.** Where leave is necessary to appeal to the court of appeals, the appeal must be taken within sixty days after such leave to appeal has been granted, provided a copy of the order appealed from and notice of its entry is properly served.[93] Where an appeal as of right is taken from an order appealable only by leave, within the sixty days from service of the order and notice of its entry but before leave to appeal is granted, the appeal cannot be validated by a leave to appeal granted nunc pro tunc as of the day the notice of appeal was served, where no new notice of appeal is served, since the court cannot indirectly extend the time to appeal any more than it can directly extend such time.[94]

ART. IV. TO APPELLATE DIVISION FROM SUPREME COURT.

§ 2611. Code rules.

An appeal to the appellate division from an order or judgment made in an action in the supreme court must be taken within thirty days after service on the attorney for the appellant of a copy of the judgment, or order, appealed from, and a written notice of the entry thereof.[95]

An appeal from an order made in a special proceeding must be taken within thirty days after service of a copy of the final order, from which it is taken, with a written notice of the entry thereof, upon the appellant; or if he appeared upon the hearing by an attorney at law or an attorney in fact upon the person who so appeared for him.[96]

[92] Wingert v. Krakauer, 180 N. Y. 265, which construes section 1318 of the Code.

[93] Lane v. Wheeler, 101 N. Y. 17; Porter v. International Bridge Co., 163 N. Y. 79. Time when leave to appeal must be applied for, see post, § 2615.

[94] Guarantee Trust Co. v. Philadelphia, R. & N. E. R. Co., 160 N. Y. 1.

[95] Code Civ. Proc. § 1351.

[96] Code Civ. Proc. § 1359.

The general rules already laid down govern the notice to limit the time to appeal.

ART. V. TO SUPREME COURT FROM AN INFERIOR COURT.

§ 2612. Code rules.

An appeal to the supreme court from a final judgment of an inferior court of record must be taken within thirty days after service on the attorney for the appellant, of a copy of the judgment, and written notice of the entry thereof.[97] If the appeal is from an order, the appeal must be taken within sixty days after service on the attorney for the appellant of a copy of the order and written notice of the entry thereof.[98]

[97] Code Civ. Proc. § 1341.
[98] Code Civ. Proc. § 1343.

CHAPTER VII.

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ART. I. LEAVE TO APPEAL.

(A) TO COURT OF APPEALS.

§ 2613. Judgments or orders as to which leave to appeal is necessary.

Appeals may be taken to the court of appeals only by leave of court in the following instances:

1. Where the subject of the appeal is an interlocutory judgment or an order in an action other than an order granting a new trial on exceptions (Code Civ. Proc. § 190, subd. 2).

2. Where the appeal is from a final judgment or a final order in an action or proceeding originally commenced in any court other than the supreme court, court of claims, county court, or a surrogate's court (Code Civ. Proc. § 191, subd. 1).

3. Where the appeal is from a unanimous affirmance of the appellate division, in certain specified actions (Code Civ. Proc. § 191, subd. 2).

This question as to when an appeal can be taken to the court of appeals only by leave has been fully treated of in a preceding chapter,[1] and the only question to be considered in this connection is as to the procedure to obtain the leave, the propriety of granting leave, and the order granting such leave.

§ 2614. To whom application to be made.

The motion can be allowed only by the appellate division, or, in certain instances, by a judge of the court of appeals.[2] The appellate division to which the application is made need not be composed of the same judges who constituted the appellate division which decided the case.[3]

§ 2615. Time for motion.

A late case lays down the rule that in all cases where leave to appeal to the court of appeals is necessary, the application

[1] See ante, §§ 2540–2543.
[2] Code Civ. Proc. §§ 190, 191.
[3] Third Ave. R. Co. v. Ebling, 100 N. Y. 98.

therefor must be made at the term at which the order or judgment appealed from was granted, or the next succeeding term.[4] The Code so expressly provides where leave is necessary because the action or proceeding was commenced in an inferior court.[5] After such time, the court has no power to grant the application, since it would, in effect, extend the time to appeal which is expressly forbidden by the Code.[6]

If leave is sought to appeal from a unanimous affirmance of a final judgment otherwise appealable as of right (Code Civ. Proc. § 191, subd. 2), the party desiring to appeal must apply at the same term or at the term of said appellate division next succeeding that at which judgment of affirmance was rendered and notice of entry thereof served on the party aggrieved, and in case said appellate division refuses such application, then such party shall have thirty days, from and after service of a copy of the order of said appellate division denying such application, with notice of entry, in which to apply to a judge of the court of appeals, to be allowed to so appeal.[7]

§ 2616. Motion papers.

Leave to appeal to the court of appeals will not be granted unless ground is shown.[8] The usual practice is to present an affidavit showing the condition of the cause, the judgment entered pursuant to the order of the appellate division, and stating the reason why an appeal should be allowed to the court of appeals.

—— **Notice of motion.** Notice should be given of the application, and it has been held that the questions of law which the moving party desires to have reviewed by the court of appeals must be definitely and concisely stated in the notice of motion.[9] It is submitted, however, that inasmuch as the order,

[4] Porter v. International Bridge Co., 163 N. Y. 79, 85.

[5] Code Civ. Proc. § 191, subd. 1.

[6] De Freest v. City of Troy, 34 Hun, 580.

[7] Code Civ. Proc. § 1310, as amended in 1898.

[8] Chatterton v. Chatterton, 34 App. Div. 245, 54 N. Y. Supp. 515; Cromwell v. Clement, 89 Hun, 603, 34 N. Y. Supp. 998.

[9] Harroun v. Brush Electric Light Co., 14 App. Div. 19, 43 N. Y. Supp. 1155. If this is not done, the motion will be denied. Id.

when granted pursuant to section 191 of the Code, need not specify any particular questions for review, and the review by the court of appeals cannot be limited by certifying particular questions, this decision should not apply where the leave to appeal is necessitated by section 191 rather than by section 190 of the Code.

—— Form of notice of motion for leave to appeal, under section 191 of Code.

[Title of cause.]

Please take notice that on the affidavit of ———, verified the ——— day of ———, 190—, the opinion and decision of the appellate division of the supreme court, ——— department herein, the printed record on appeal, and all papers, pleadings and proceedings herein, the undersigned will move the appellate division of the supreme court, ——— department, at the appellate division court room, in the city of ———, county of ———, on the ——— day of ———, 190—, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for the certificate of said appellate division, as provided by subdivision one [or "two"] of section 191 of the Code of Civil Procedure, that in its opinion a question of law is involved herein which ought to be reviewed by the court of appeals, and for permission to the appellants herein to appeal to said court of appeals as in and by said section provided, and for such other and further relief as may be just.

[Date.] [Signature and office address of attorneys for appellants.]

[Address to attorneys for respondents.]

—— Form of notice of application to judge of court of appeals.

[Title of cause.]

Please take notice that on the printed record on appeal, the decision and opinion of the appellate division, ——— department, in the above case, the notice of motion for a certificate of the above-named appellate division, the order of said appellate division denying the motion for leave to go to the court of appeals, and the order and judgment of [affirmance] of the said appellate division in the above-entitled action, and on all the proceedings and papers herein, an application will be made to Hon. ———, one of the judges of the court of appeals, at the chambers of said court at the city of Albany, on the ——— day of ———, 190—, at ——— o'clock of that day, for an order or certificate allowing an appeal to the court of appeals by ——— from said order and judgment of [affirmance], pursuant to

subdivision 2 of section 191 of the Code of Civil Procedure, and for such other relief as may be just and proper.

[Date.] [Signature and office address of attorneys.]
[Address.]

§ 2617. Stay of proceedings pending application for leave.

A party aggrieved who intends to apply for leave to appeal to the court of appeals may, on proof by affidavit, obtain an order staying all proceedings to enforce the judgment, until the granting or refusal of such leave, in a case where leave to appeal is necessary because of a unanimous affirmance by the appellate division (Code Civ. Proc. § 191, subd. 2).[10]

§ 2618. When leave to appeal should be granted.

The propriety of allowing an appeal to the court of appeals has been but little discussed by the court of appeals or the appellate division. There are, however, many decisions of the court of common pleas, now abolished, as to when leave to appeal should be granted and when refused. In a recent case, where a final judgment was not appealable as of right because of a unanimous affirmance by the appellate division, the court of appeals held that an appeal should be allowed only where (1) there is reason to believe that some material error is disclosed by the record "and" (2) where such error is of sufficient importance to require the general principle of finality appertaining to the decisions of the appellate division to be disregarded in the particular case by the allowance of another appeal.[11] It was also held that the mere existence of errors prejudicial only to the particular parties does not of itself warrant the allowance of an appeal, if the questions have no public aspect.[12] And it was said that it would seem that leave should be granted where there is a conflict of decisions between different appellate divisions,[13] or where the supposed error re-

[10] Code Civ. Proc. 1310. See post, § 2654.

[11, 12] Sciolina v. Erie Preserving Co., 151 N. Y. 50, 53.

[13] Sciolina v. Erie Preserving Co., 151 N. Y. 50, 53, 54. See Clapp v. Graves, 2 Hilt. 243, where appeal was allowed because decision of common pleas was in conflict with decision of supreme court.

lates to a principle of law or a question of evidence, which, if permitted to pass uncorrected, will be likely to introduce confusion into the body of the law from the frequent recurrence of occasions where the same questions will come up.[14]

Earlier cases, decided by the common pleas and superior city courts, laid down the following rule as to when an appeal should be allowed:[15] If there is fair and reasonable ground to doubt the correctness of the decision,[16] leave should be granted where (1) the construction of public statutes is involved;[17] or (2) the questions of law are of public importance or affect large public interests; or (3) the principles involved are of importance to others than the parties litigant;[18] or (4) a large number of cases are depending on the determination of one case.[19] An appeal to the court of appeals may be allowed where the question presented is novel and of first impression.[20]

Leave will not be granted because the decision will compel a party to pay costs in numerous other actions which he has brought,[21] nor because the court of appeals has not yet passed on the precise point involved,[22] nor to enable counsel to attempt to obtain a modification of a pertinent decision of the court of appeals which has been followed for many years.[23]

[14] Id.

[15] Butterfield v. Radde, 38 Super. Ct. (6 J. & S.) 44; Atlantic & Pacific Tel. Co. v. Barnes, 39 Super. Ct. (7 J. & S.) 357; Spofford v. Rowan, 14 Daly, 236. These cases seem to state the existing rule.

[16] Fire Dept. v. Wendell, 13 Daly, 427. Where law is well settled no appeal will be allowed. Deutsch v. Reilly, 19 Alb. Law J. 162.

[17] Leave will not be granted where the court is not in doubt as to its proper construction or the correctness of the decision. Fire Dept. v. Wendell, 13 Daly, 427.

[18] Butterfield v. Radde, 38 Super. Ct. (6 J. & S.) 44; Wallace v. Dinniny, 12 Misc. 635, 32 N. Y. Supp. 1150.

[19] See Barwick v. Youmans, 14 Misc. 643, 35 N. Y. Supp. 1103; Brand v. Godwin, 15 Daly, 469, 8 N. Y. Supp. 339, 9 N. Y. Supp. 743. Leave should be granted where there are numerous other claims against the defendant involving the same questions. Fischer v. Hope Mut. Life Ins. Co., 40 Super. Ct. (18 J. & S.) 550.

[20] Mundt v. Glockner, 26 App. Div. 123, 50 N. Y. Supp. 190.

[21] Myers v. Rosenback, 14 Misc. 638, 36 N. Y. Supp. 7.

[22] Hamburger v. Rodman, 9 Daly, 93.

[23] Ward v. Edesheimer, 45 State Rep. 283, 18 N. Y. Supp. 139.

Leave to appeal should be denied where no novel question of law is involved;[24] where the question of law involved has been passed on by the court of appeals;[25] where the decision does not affect interests other than those of the parties to the action;[26] where it was not necessary to decide the question of law as to which there is doubt;[27] where the question to be decided is one of practice and an appeal in another cause is pending to determine the point;[28] or where the case involves a trifling amount and the objection is a technical one.[29] Leave to appeal should be granted only in a case both of great importance and of doubt. Where the only question is one of pleading, which does not go to the merits of the action, leave should not be granted.[30] So where the affirmance of the appellate division depends in part on its disposition of a question "of fact," leave will not be granted.[31]

The fact that an appeal is dismissed because the judgment appealed from is not appealable except by leave of court and the court of appeals refuses leave to apply to the court below to allow the appeal does not preclude the granting of leave by the appellate division after such dismissal and a second appeal.[32]

§ 2619. Order.

If the application is made under subdivision 2 of section 190 of the Code and leave to appeal is granted, specific questions of law must be certified for review;[32a] but if the application is

[24] Fulton v. Metropolitan Life Ins. Co., 2 Misc. 55, 20 N. Y. Supp. 989; Wallace v. Dinniny,, 12 Misc. 635, 32 N. Y. Supp. 1150; Claflin v. Flack, 37 State Rep. 509, 13 N. Y. Supp. 916.

[25] White v. Balta, 7 Misc. 662, 28 N. Y. Supp. 3.

[26] Wallace v. Dinniny, 12 Misc. 635, 32 N. Y. Supp. 1150.

[27] Josuez v. Murphy, 6 Daly, 404.

[28] Palmer v. Moeller, 2 Hilt. 421.

[29] Ahern v. National S. S. Co., 11 Abb. Pr. (N. S.) 356; Lynch v. Sauer, 16 Misc. 362, 38 N. Y. Supp. 1.

[30] Roeber v. New Yorker Staats Zeitung, 2 App. Div. 163, 37 N. Y. Supp. 719.

[31] Village of Bronxville v. New York, W. & C. Traction Co., 46 App. Div. 627, 61 N. Y. 719.

[32] Good v. Daland, 119 N. Y. 153.

[32a] Form and contents of questions certified, see ante, § 2541.

made under section 191 of the Code, it is sufficient to merely certify that "questions of law are involved in this action which should be reviewed by the court of appeals."[33] The scope of the review by the court of appeals, in the latter instance, cannot be limited to questions certified.

The appellate division has no power to allow an appeal, given as a matter of right under certain conditions, by dispensing with the conditions. For instance, the appellate division cannot allow an appeal to the court of appeals from an order granting a new trial on exceptions, except on the condition that the appellant gives a stipulation for judgment absolute.[34]

—— Form of order granted under section 191 of Code.

[Title of cause.] At a term of the appellate division, etc.

The [defendants] A. X., B. S., and C. R., in the above-entitled action, having moved this court for leave to appeal to the court of appeals from the judgment of [affirmance] in this action, pursuant to ———, on the ——— day of ———, 190—, and the same coming on to be heard before this appellate division, at the ——— term thereof, for the year 190—, at the rooms of said court in the city of ———, county of ———, on the ——— day of ———, 190—, and after hearing ———, of counsel for the appellants, in support of said motion, and ——— of counsel for the respondent in opposition, and on reading and filing the notice of motion and affidavit of ———, and the affidavit of ——— in opposition, now, on motion of ———, attorneys for the respondents,

Ordered that the said motion for leave to appeal to the court of appeals be and the same hereby is granted, on payment of ——— dollars costs, and it is further ordered and this court hereby certifies that in its opinion a question of law is involved herein that ought to be reviewed by the court of appeals.

—— Form of order granted under section 190 of Code.

[Title, etc., as in preceding form.]

[Same as in preceding form down to ordering clause, and add:]

Ordered, that the said motion for the allowance of an appeal to the

[33] Young v. Fox, 155 N. Y. 615; Commercial Bank v. Sherwood, 162 N. Y. 310; Kurz v. Doerr, 180 N. Y. 88, 92.

[34] Mundt v. Glokner, 160 N. Y. 571, 576.

court of appeals, be and hereby is, granted, on payment of ——— dollars as costs, and the following questions certified:

1. Whether, on the facts shown by the record herein, * * * .
2. Whether, * * * .

Enter.

P. J.

——**Allowance nunc pro tunc.** Where an appeal is attempted to be taken without leave of court, in a case in which leave is necessary, a subsequent order allowing an appeal cannot be made to take effect nunc pro tunc, without the service of a new notice of appeal.[35]

§ 2620. Effect of leave to appeal.

The allowance of an appeal to the court of appeals does not, in any way, change or add to the authority of the court of appeals, or affect the manner of determining the questions involved.[36] The permission to appeal in no way enlarges the jurisdiction of the court with respect to the questions that may be reviewed by it on a hearing of the appeal. For instance it does not bring up for review a question as to the existence and the sufficiency of the evidence where there has been a unanimous affirmance by the appellate division. So the leave does not authorize a review of discretionary matters.[37] The allowing an appeal does not (1) broaden the scope of review of the court of appeals as fixed by the Constitution,[38] nor (2) authorize the dispensing with a stipulation for judgment absolute where the appeal is from an order granting a new trial on exceptions.[39]

[35] Guarantee Trust & Safe Deposit Co. v. Philadelphia, R. & N. E. R. Co., 160 N. Y. 1, 7.

[36] Caponigri v. Altieri, 164 N. Y. 476, which held that determination of appellate division on the facts could not be reviewed.

[37] Lewin v. Lehigh Valley R. Co., 169 N. Y. 336.

[38] Court of appeals can review only questions of law even though leave to appeal is granted. Reed v. McCord, 160 N. Y. 330.

[39] Mundt v. Glokner, 160 N. Y. 571.

(B) TO APPELLATE DIVISION.

§ 2621. Code provision.

Section 1344 of the Code provides that where appeals from the judgment of any municipal court in either of the boroughs of Manhattan or the Bronx in the city of New York or from a judgment or order of the city court of New York, are heard by the justices composing the appellate term, the justice or justices by whom such appeal was determined [or a justice of the appellate division in the first judicial department] may allow an appeal to be taken to the appellate division from such determination. The matter in brackets was added by amendment in 1904.

§ 2622. To whom application to be made.

Prior to the 1904 amendment of section 1344 of the Code, it was held that the justices who heard the appeal, as such justices, and no one else, could allow an appeal,[40] but now it is expressly provided that the appeal may be allowed by the justice or justices by whom the first appeal was determined or by "a justice of the appellate division in the first judicial department."

§ 2623. Time for motion.

The application for leave to appeal to the appellate division must be made on the first day of the term following the term in which the case was decided.[41]

§ 2624. Motion papers.

The application for leave to appeal to the appellate division must be made in writing, on notice to the adverse party; and

[40] Jaeger v. Koenig, 67 App. Div. 552, 73 N. Y. Supp. 907; Harrison v. Weir, 68 App. Div. 25, 73 N. Y. Supp. 1119. Compare Curtin v. Metropolitan St. R. Co., 22 Misc. 586, 27 Civ. Proc. R. (Kerr) 97, 49 N. Y. Supp. 668.

[41] Rule 7 of appellate division, first department, of rules relating to hearing of appeals from the city court of the city of New York and the district courts therein.

such application must set forth in full the special reasons why such an appeal should be allowed, and must be submitted without oral argument.[42]

§ 2625. When leave to appeal should be granted.

The rules laid down by the old court of common pleas on motions for leave to appeal to the court of appeals, in actions commenced in the city and district courts, as to the propriety of granting leave, seem to apply equally well to applications to the appellate term for leave to appeal.[43] And it would seem that the rules already laid down as to when leave to appeal to the court of appeals should be granted, and when refused, also apply to the propriety of granting leave to apply to the appellate division.

The granting of leave is discretionary.[44]

§ 2626. Order.

The order granting leave to appeal cannot restrict the scope of review by the appellate division by certifying special questions for determination.[45] It is improper to certify special questions.

(C) SECOND OR FURTHER APPEALS.

§ 2627. General rule.

It has already been stated in a preceding chapter[46] that "leave to appeal is usually necessary where a second appeal is taken to the same court from the same judgment or order, after a dismissal of a previous appeal." Where, however, the first appeal is dismissed as a nullity, a second appeal may be taken without leave.[47]

[42] Id.

[43] Lynch v. Sauer, 16 Misc. 362, 38 N. Y. Supp. 1.

[44] Lesster v. Lawyers' Surety Co., 50 App. Div. 181, 185, 63 N. Y. Supp. 804.

[45] O'Rourke v. Feist, 42 App. Div. 136, 59 N. Y. Supp. 157; Bang v. McAvoy, 52 App. Div. 501, 65 N. Y. Supp. 467.

[46] See ante, § 2528.

[47] Keller v. Cleary, 62 App. Div. 609, 70 N. Y. Supp. 899.

ART. II. NOTICE OF APPEAL.

§ 2628. Necessity.

An appeal must be taken by serving and filing a notice of appeal.[48] Early cases holding that the service of a copy of the case and exceptions was equivalent to a formal notice of appeal,[49] especially where not objected to,[50] have been criticized,[51] and it would seem that they should not be followed.

§ 2629. Who may give notice.

According to the later authorities, an appeal cannot be taken by an attorney who has not been regularly substituted in place of the attorney who appeared in the action,[52] except that an appeal may be taken to the court of appeals without a substitution, under rule three of the court of appeals.[53]

§ 2630. Form and contents.

The notice must be in writing and "to the effect that the appellant appeals from the judgment or order, or from a specified part thereof."[54] The notice should state who appeals and the court to which the appeal is taken, and designate the judgment or order appealed from in such a way that the adverse parties will not be misled. But an incorrect or informal designation of the appellate court is not a fatal error where the parties served with the notice could not have been misled,[55] and the

[48] Code Civ. Proc. § 1300.

[49] Sherman v. Wells, 14 How. Pr. 522; Jackson v. Fassitt, 12 Abb. Pr. 281, 33 Barb. 645, 21 How. Pr. 279.

[50] Sherman v. Wells, 14 How. Pr. 522; Jackson v. Fassitt, 12 Abb. Pr. 281, 33 Barb. 645, 21 How. Pr. 279.

[51] Salls v. Butler, 27 How. Pr. 133.

[52] Pensa v. Pensa, 3 Misc. 417, 23 N. Y. Supp. 186, and cases cited; Shuler v. Maxwell, 38 Hun, 240. Contra, Webb v. Milne, 10 Civ. Proc. R. (Browne) 27; Pratt v. Allen, 19 How. Pr. 450.

[53] Magnolia Metal Co. v. Sterlingworth Railway Supply Co., 37 App. Div. 366, 56 N. Y. Supp. 16.

[54] Code Civ. Proc. § 1300.

[55] Appeal to "supreme court." People ex rel. Boylston v. Tarbell,

entire omission to name the appellate court may be waived.[56] An appeal from an order denying a motion to revive an action in favor of the representatives of a party who has died after issue joined may be entitled in the name of such representatives.[57] An erroneous title may be amended.[58] It is not necessary to state the grounds of appeal.[59]

A notice, in terms, from the "actual determination" of the general term of the New York City court, where the printed case contained the order of affirmance but not the judgment of affirmance, was held to operate only as an appeal from the order, and to confer no authority on the appellate court to review the proceedings.[60]

—— Form of notice of appeal from final judgment.

[Title of cause.]

Please take notice that ———, the ——— in this action, appeals to the appellate division of the supreme court, from the final judgment of the supreme court in favor of ——— against ———, entered in the office of the clerk of ——— county, on the ——— day of——— 190—, [and that the appellant intends to bring up for review on such appeal ——— entered in this action in the office of the clerk of ——— county on the ——— day of ———, 190—].

[Date.] [Signature and office address of attorney for appellant.]

[Address to opposing attorney and to clerk of county where order or judgment is entered.]

—— Form of notice of appeal from a judge's order.

[Title of cause.]

Please take notice that ———, the ——— herein, appeals to the ap-

17 How. Pr. 120. The notice may be corrected by the appellate term, on motion, where notice is of appeal to appellate "division" instead of "term." Clapp v. Sternglanz, 23 Misc. 641, 52 N. Y. Supp. 156.

[56] Matter of Gates, 26 Hun, 179; Silsbee v. Gillespie, 9 Abb. Pr. (N. S.) 139.

[57] McLachlin v. Brett, 27 Hun, 18.

[58] McLachlin v. Brett, 27 Hun, 18; Ten Eick v. Simpson, 11 Paige, 177.

[59] Wilson v. Allen, 3 How. Pr. 369. Rule was to the contrary on an appeal from the marine court to the common pleas. Irwin v. Muir, 4 Abb. Pr. 133, 13 How. Pr. 409.

[60] Whitfield v. Broadway & S. A. R. Co., 25 Abb. N. C. 59, 31 State Rep. 285, 19 Civ. Proc. R. (Browne) 105, 10 N. Y. Supp. 106.

pellate division of the supreme court, ——— department, from the order made in this action on the ——— day of ———, 190—, by Hon. ———, justice of the supreme court, and entered in the office of the clerk of ——— county, on the ——— day of ———, 190—, granting [or "denying"] the motion of ———, the ———, for ———.

[Subscription, date, and address as in preceding form.]

——**Reference to judgment or order appealed from.** The judgment or order appealed from must be so designated that the adverse parties served with the notice cannot be misled as to what has been appealed. It is customary to specify the clerk's office in which the judgment or order is entered, but failure to do so is not a jurisdictional defect.[61]

If the appeal is from a judgment it is usual to designate it as final or interlocutory and to state in what court it was rendered and in what clerk's office filed. A notice of appeal from the appellate division is not defective merely because the judgment of affirmance is referred to as for a certain amount, which represents the costs only, where the notice clearly shows that the judgment appealed from is the judgment of affirmance.[62]

If the appeal is from an order, the notice must designate the particular order appealed from and state its character.[63] A shot-gun notice of appeal from an order and from "all proceedings had or taken herein, and each and every part of said order and proceedings" does not enlarge the scope of review.[64] If the meaning is apparent, it is immaterial that the notice, by mistake, speaks of a judgment, though none has been entered.[65] A defect in a notice of appeal from an order which sufficiently apprises the respondent of the order appealed from in that the notice states that the appeal is from an order entered very briefly on an earlier date instead of from such order entered thereafter at length, may be disregarded.[66] A notice of appeal

[61] Silsbee v. Gillespie, 9 Abb. Pr. (N. S.) 139.

[62] Engel, Heller Co. v. Henry Elias Brewing Co., 37 Misc. 480, 75 N. Y. Supp. 1080.

[63] Francis v. Tilyon, 26 App. Div. 340, 49 N. Y. Supp. 799.

[64] Isaacs v. Calder, 42 App. Div. 152, 59 N. Y. Supp. 21.

[65] Van Ingen v. Snyder, 24 Hun, 81; Wulff v. Cilento, 28 Misc. 551, 59 N. Y. Supp. 525.

[66] Lindon v. Beach, 6 Hun, 200.

from an order "entered herein on the * * * day of * * *, as resettled by the order entered herein on the * * * day of * * *, and from each and every part thereof" is sufficient to bring up the whole order as resettled.[67] But a notice of appeal from an order alleged to be made and entered on a certain day, where no such order was of record on the date specified, is ineffectual to authorize a review of such order.[68] A notice of appeal from an order "of the special term of this court" is not fatally defective though the appeal is really from a judge's order.[69]

If the appeal is from only a part of a judgment or order, the part appealed from should be so clearly referred to that there can be no mistake. The correctness of a portion of a judgment or order expressly excepted from the notice of appeal is not reviewable.[70]

—— **Stipulation for judgment absolute.** If an appeal is taken to the court of appeals[71] or to the appellate term from the city court of New York,[72] from an order granting a new trial on a case or exceptions, the notice of appeal must contain a stipulation for judgment absolute in case the order is affirmed.[73]

—— **Form of notice of appeal to court of appeals with stipulation for judgment absolute.**

[Title of the cause.]

Please take notice that ———, the ———, appeals to the court of appeals from the order of the appellate division of the supreme court, ——— department, made in this action, and entered in the office of the clerk of said appellate division on the ——— day of ———, 190—, and entered in the office of the clerk of ——— county on the ——— day of ———, 190—, granting a new trial herein; and the said ——— hereby assents that if the said order be affirmed on said appeal judgment absolute shall be rendered against him.

[Subscription, date, and address as in preceding form.]

[67] Seligsberg v. Schepp, 79 App. Div. 626, 630, 80 N. Y. Supp. 154.
[68] Francis v. Tilyon, 26 App. Div. 340, 49 N. Y. Supp. 799.
[69] O'Connor v. McLaughlin, 80 App. Div. 305, 80 N. Y. Supp. 741.
[70] Van Camp v. Fowler, 59 Hun, 311, 13 N. Y. Supp. 1.
[71] See ante, § 2539.
[72] Code Civ. Proc. § 3191, subd. 2.
[73] That omission of stipulation is amendable, see post, § 2638.

§ 2631. Review of interlocutory judgment or intermediate order on appeal from final judgment or final order.

The Code provides as follows: "Where the appeal is from a final judgment, or from a final order in a special proceeding, and the appellant intends to bring up, for review thereupon, an interlocutory judgment or an intermediate order, he must, in the notice of appeal, distinctly specify the interlocutory judgment or intermediate order to be reviewed."[74] This Code rule applies to actions only when the appeal is from a "final judgment,"[75] and to special proceedings only when the appeal is from a "final order."[76] Unless specified in the notice of appeal, an interlocutory judgment[77] or intermediate order[78] is not reviewable on an appeal from a final judgment or from a final order in a special proceeding. The failure to state that an intermediate order will be brought up for review deprives appellant, if defeated on the appeal from the final judgment, of the right to afterwards appeal from such order.[79] Prior to the present Code, an interlocutory judgment was reviewable on an appeal from a final judgment, whether or not mentioned

[74] Code Civ. Proc. § 1301.

[75] Arkenburgh v. Arkenburgh, 14 App. Div. 367, 43 N. Y. Supp. 892; Myres v. Myres, 18 State Rep. 509, 2 N. Y. Supp 465

[76] Oneonta, C. & R. S. R. Co. v. Cooperstown & C. V. R. Co., 85 App. Div. 284, 83 N. Y. Supp. 307; New York, L. & W. R. Co., v. Erie R. Co., 170 N. Y. 448.

[77] If not specified, the interlocutory judgment, as to all points covered thereby, is to be taken as the settled law of the case and is not open for review on the appeal. Reese v. Smyth, 95 N. Y. 645; Patterson v. McCunn, 38 Hun, 531; Cameron v. Equitable Life Assur. Soc., 45 Super. Ct. (13 J. & S.) 628. Section 1350 of the Code precludes a review of an interlocutory judgment on an appeal from a final judgment, in certain instances, unless the interlocutory judgment is specified in the notice of appeal. Rich v. Manhattan R. Co., 150 N. Y. 542.

[78] Stearns v. Shepard & Morse Lumber Co., 91 App. Div. 56, 86 N. Y. Supp. 396; McIlvaine v. Steinson, 90 App. Div. 77, 85 N. Y. Supp. 889.

Order denying motion to make person a party. Snyder v. Bliss, 19 Wkly. Dig. 304. Order increasing verdict so as to give treble damages. Purton v. Watson, 19 State Rep. 6, 2 N. Y. Supp. 661. Order granting or denying a new trial on the judge's minutes. Manhattan Brass Co. v. Gilman, 20 Misc. 722, 45 N. Y. Supp. 818.

[79] Whitman v. Foley, 40 State Rep. 721, 16 N. Y. Supp. 23.

in the notice of appeal,[80] as was an "intermediate order involving the merits and necessarily affecting the judgment."[81]

Such statement in the notice of appeal is equivalent to a direct notice of appeal from such interlocutory judgment or intermediate order.[82]

If the final judgment is the necessary result of an intermediate order or interlocutory judgment, it would seem to be the better practice to appeal directly from such interlocutory judgment or intermediate order;[83] in such a case, if the appeal is from the final judgment, and such interlocutory judgment or intermediate order is not specified in the notice of appeal, the final judgment must be affirmed.[84]

The decision on which is based an interlocutory judgment sustaining or overruling a demurrer is not an intermediate order which must be specified in the notice of appeal, in order to be reviewed, but it is sufficient, on an appeal from the final judgment to specify the interlocutory judgment in the notice of appeal.[85]

Where exceptions are ordered to be heard in the first instance by the appellate division, and they are overruled and judgment ordered, and judgment is duly entered, it is not necessary to appeal both from the judgment and the order nor to include in the notice of appeal from the judgment a statement that the order of the appellate division will be brought up for review.[86]

[80] Ansonia Brass & Copper Co. v. Conner, 13 Wkly. Dig. 87.

[81] Code Pro. § 11, subd. 1. Order substituting party, after death of plaintiff, held not such an order. Hackett v. Belden, 47 N. Y. 624.

[82] Taylor v. Smith, 24 App. Div. 519, 49 N. Y. Supp. 41.

[83] James v. Shea, 28 Hun, 74. It seems that if the interlocutory judgment or intermediate order is merged in the final judgment, it will not be reviewed. Bates v. Holbrook, 89 App. Div. 548, 551, 85 N. Y. Supp. 673.

[84] Oesterreicher v. Raisbeck, 51 Super. Ct. (19 J. & S.) 416. Maddock v. Van Kleeck, 49 Super. Ct. (17 J. & S.) 496. See, also, Townsend v. City of New York, 35 State Rep. 465, 30 Civ. Proc. R. (Browne) 200, 12 N. Y. Supp. 461.

[85] Wright v. Chapin, 74 Hun, 521, 31 Abb. N. C. 137. See, also, Douglas v. Coonley, 84 Hun, 158, 32 N. Y. Supp. 444.

[86] Becker v. Kock, 104 N. Y. 394.

A notice of appeal from a judgment, which specifies for review an order denying a motion for a new trial, does not bring up for review a subsequent order denying a new trial though the order denies the motion "with the same force and effect as if a motion for a new trial on the same grounds had been made on the minutes at the close of a new trial and denied."[87]

—— **Amendment of notice.** The omission to specify the interlocutory judgment or intermediate order cannot be remedied by allowing an amendment in the appellate court, since the court cannot thus extend the statutory time within which an appeal may be taken.[88]

—— **Effect of expiration of time within which to appeal.** An interlocutory judgment or intermediate order can be reviewed by a statement in the notice of appeal though the time to appeal therefrom has expired at the time the appeal is taken from the final judgment.[89]

—— **Sufficiency of notice of intention to review.** If the notice distinctly specifies the interlocutory judgment or intermediate order sought to be reviewed, it is sufficient. No particular form of language is requisite.[90]

—— **What is an "intermediate" order.** A conflict of opinion in earlier cases as to what constitutes an "intermediate" order has been set at rest by the court of appeals which has held that intermediate orders are those made after the service of summons and before the entry of judgment.[91] It

[87] Fraser v. Alpha Combined Heating & Lighting Mfg. Co., 25 Misc. 422, 54 N. Y. Supp. 1087.

[88] See post § 2638.

[89] Code Civ. Proc. § 1316. So held where appeal was from the final order in a special proceeding. Moyer v. Moyer, 7 App. Div. 523, 533, 40 N. Y. Supp. 258. Contra, Taylor v. Smith, 24 App. Div. 519, 49 N. Y. Supp. 41.

[90] Pfeffer v. Buffalo Ry. Co., 4 Misc. 465, 24 N. Y. Supp. 490. Crouch v. Moll, 28 State Rep. 48, 8 N. Y. Supp. 183. Stivers v. Ritt, 29 Misc. 341, 60 N. Y. Supp. 507. Taylor v. Smith, 24 App. Div. 519, 49 N. Y. Supp. 41.

[91] Fox v. Matthiessen, 155 N. Y. 177, reversing 84 Hun, 396, 32 N. Y. Supp. 356. Followed in Taylor v. Smith, 164 N. Y. 399, reversing 24 App. Div. 519, 49 N. Y. Supp. 41.

Where, after a referee made a report dismissing the complaint,

follows that an order denying a new trial, made and entered after the entry of judgment, is not an "intermediate" order which may be so reviewed.[92] So an order made after the entry of judgment, appointing a referee, is not an "intermediate" order.[93] But an order denying a motion for a new trial made on the judge's minutes after the trial by jury of specific issues in an equitable suit is an intermediate order.[94]

—— **What is an order which "necessarily affects the final judgment."** If the appeal is from a final judgment, an interlocutory judgment or intermediate order specified in the notice of appeal is not brought up for review unless it "necessarily affects the final judgment."[95] The question whether any particular order necessarily affects the final judgment is an open one concerning which the holdings of the supreme court are in conflict. It has been said that such orders are those which, if reversed, would take away the foundation of the judgment or make the trial or the judgment entered invalid or without support.[96] It has been held that an order denying a motion for a new trial necessarily affects the final judgment,[97] as does an order denying a motion for the settlement of issues in an equitable suit, for trial by a jury,[98] or an order sustaining a demurrer to part of a pleading,[99] or an order striking out a good defense from the answer,[100] or an order permitting a receiver

plaintiff moved to amend, and to recommit the report to the referee for further findings, orders denying such motions are not intermediate orders. Spencer v. Huntington, 100 App. Div. 463, 91 N. Y. Supp. 561. An order permitting an amendment of the complaint, where the trial is suspended and the case put over the term, is not an order made during the trial. Shannon v. Pickell, 2 State Rep. 160.

[92] Hymes v. Van Cleef, 39 State Rep. 810, 814, 15 N. Y. Supp. 341; Zeisloft v. George V. Blackburne Co., 45 Misc. 595, 91 N. Y. Supp. 8.

[93] Mills v. Stewart, 88 Hun, 503, 34 N. Y. Supp. 786.

[94] Anderson v. Carter, 24 App. Div. 462, 49 N. Y. Supp. 255.

[95] Code Civ. Proc. § 1316.

[96] Raff v. Koster, Bial & Co., 38 App. Div. 336, 56 N. Y. Supp. 997.

[97] Fox v. Matthiessen, 155 N. Y. 177. Contra, Taylor v. Smith, 24 App. Div. 519, 527, 49 N. Y. Supp. 41.

[98] Herb v. Metropolitan Hospital, 80 App. Div. 145, 152, 80 N. Y. Supp. 552, McLaughlin, J., and Van Brunt, P. J., dissent.

[99] Ayres v. Western R. Co., 45 N. Y. 260.

[100] Rapalee v. Stewart, 27 N. Y. 310.

to intervene as a defendant, where he pleads a material defense not set up by the other defendants.[101] On the other hand, the following orders have been held not to "necessarily affect the final judgment:" Order of reference;[102] order granting a bill of particulars;[103] order substituting a person as plaintiff;[104] order refusing to allow answer to be amended after filing of judge's decision;[105] order striking out an answer as frivolous, where an amended answer is served;[106] order requiring answer to be made more definite and certain;[107] order denying a motion to send back a commission for a fuller execution.[108]

—— **Successive reviews of interlocutory judgment or intermediate order.** If the appeal is from a final judgment, an interlocutory judgment or intermediate order is not brought up for review, by specifying it in the notice of appeal, if it has "already been reviewed, on a separate appeal therefrom, by the court or the term of the court, to which the appeal from the final judgment is taken.[109] An intermediate order, separately appealed from and affirmed "by default," has "already been reviewed," within this Code provision.[110]

§ 2632. Signature.

The notice should be signed by the attorney of record in the court below, unless there has been a substitution, in which case it should be signed by the attorney substituted.[111] This

[101] Honegger v. Wettstein, 94 N. Y. 252, 262.

[102] McCall v. Moschcowitz, 10 Civ. Proc. R. 107. Bloom v. National United Ben. Sav. Co., 81 Hun, 120, 30 N. Y. Supp. 700. Roslyn Heights Land & Imp Co. v. Burrowes, 22 App. Div. 540, 48 N. Y. Supp. 15. Contra, Stokes v. Stokes, 87 Hun, 152, 33 N. Y. Supp. 1024.

[103] Raff v. Koster, Bial & Co., 38 App. Div. 336, 56 N. Y. Supp. 997.

[104] Rogers v. Ingersoll, 103 App. Div. 490, 93 N. Y. Supp. 140.

[105] Callanan v. Gilman, 52 Super. Ct. (20 J. & S.) 112.

[106] Mutual Life Ins. Co. v. Hoyt, 10 Wkly. Dig. 275.

[107] Innes v Purcell, 58 N. Y. 388.

[108] Pratt v. Mosetter, 9 Civ. Proc. R. (Browne) 351.

[109] Code Civ. Proc. § 1316.

[110] Wiener v. Morange, 7 Daly, 446.

[111] Objection to service of notice by attorneys not substituted as attorneys of record is waived by failure to move to dismiss. Thierry v. Crawford, 33 Hun, 366.

rule is, however, subject to the exception that if the appeal is to the court of appeals a new attorney for the appellant may sign the notice, though he has not been formally substituted.[112] A notice signed "of counsel" is irregular but is amendable in the appellate court.[113] It seems that the fact that the signature is on the back of the notice instead of at the end of it is a mere irregularity which may be cured by amendment,[114] especially where it is signed at the end by the appellant himself.[115]

§ 2633. To whom notice must be given.

The notice of appeal must be served "on the attorney for the adverse party" and must be filed in the office of "the clerk with whom the judgment or order appealed from is entered."[116] The "adverse party" means the party whose interest in relation to the subject of the appeal is in conflict with the reversal of the order or judgment appealed from, or the modification sought by the appeal.[117]

The adverse party may be a co-party. Where some defendants are successful, and others unsuccessful, notice of an appeal taken by the latter must be given to the former, if the interests of the successful defendants are adverse to those of the appellants.[118] For instance, a co-defendant to whom the judgment requires the defendant, who appeals, to pay money, is an adverse party to whom notice must be given.[119] So where the question in a foreclosure suit is whether a co-defendant's mortgage subsequent to plaintiff's first mortgage but prior to

[112] See ante, § 2629.

[113] Seaman v. McReynolds, 40 Super. Ct. (8 J. & S.) 545.

[114] Gutbrecht v. Prospect Park & C. I. R. Co., 28 Hun, 497.

[115] Burrows v. Norton, 5 T. & C. 97.

[116] Code Civ. Proc. § 1300. Notice cannot be served on a part of the adverse parties and after a decision on appeal a separate notice of appeal be served on the remainder. Matter of Maxwell, 74 Hun, 307, 26 N. Y. Supp. 216.

[117] Cotes v. Carroll, 28 How. Pr. 436; Hiscock v. Phelps, 2 Lans. 106.

[118] So held where action was to construe will. West v. Place, 80 Hun, 255, 30 N. Y. Supp. 14; Cotes v. Carroll, 28 How. Pr. 436.

[119] Cooper v. Cooper, 76 App. Div. 221, 78 N. Y. Supp. 397.

his second mortgage, should be postponed to both of plaintiff's mortgages, and said defendant appeals, he must give notice to the other defendants whose answer affirmed plaintiff's claim.[120] If the interests of a co-party are not adverse, he need not be given notice. For instance, an assignee of part of a mortgage, made a defendant in foreclosure, who serves no answer on, and makes no claim against, a co-defendant, is not and adverse party.[121] So where a co-trustee who does not join as plaintiff is made a defendant, notice of appeal need not be given to him, irrespective of whether the appeal is taken by plaintiff or by his co-defendants.[122] And a defendant who has defaulted need not be given notice by his co-defendant.[123]

The adverse party to whom notice must be given need not be a party to the action. It is sufficient that he is a party to the order appealed from. For instance, notice of an appeal from an order denying a motion for a resale and requiring the purchaser to complete must be given the purchaser at a judicial sale.[124] So a person allowed to intervene in proceedings for the distribution of firm assets, to prove his claim, becomes a party to the record, though neither plaintiff nor defendant, so as to be entitled to notice.[125]

Notice of appeal from an order of interpleader must be given to the defendants brought in by the order.[126]

Notice to one partner is notice to both.[127]

If, in a mechanic's lien action brought by a sub-contractor, notice of appeal is not given to the owner of the property affected by the lien, the court has no jurisdiction to reverse that portion of the judgment which declares the lien of the subcontractor to be void.[128]

[120] Hiscock v. Phelps, 2 Lans. 106.
[121] Pickersgill v. Read, 7 Hun, 636.
[122] Kilmer v. Hathorn, 78 N. Y. 228.
[123] Garnsey v. Knights, 1 T. & C. 259.
[124] Barnes v. Stoughton, 6 Hun, 254.
[125] Dawson v. Parsons, 16 Misc. 190, 38 N. Y. Supp. 1000.
[126] Bemis v. Huntington, 15 App. Div. 627, 44 N. Y. Supp. 439.
[127] Miller v. Perrine, 1 Hun, 620 (mem).
[128] Murdock v. Jones, 3 App. Div. 221, 38 N. Y. Supp. 461. See, also, Stanton v. Gohler, 16 Misc. 383, 38 N. Y. Supp. 64.

—— **Supplying omission to give notice to all.** It will be observed that section 1300 of the Code requires notice to be given both to the adverse party and to the clerk of the court.[128] Section 1303 of the Code provides, however, that where the appellant, seasonably and in good faith, serves the notice of appeal either upon the clerk or upon the adverse party, or his attorneys, but omits, through mistake, inadvertence, or excusable neglect, to serve it upon the other, the court, in or to which the appeal is taken, upon proof, by affidavit, of the facts, may, in its discretion, permit the omission to be supplied upon such terms as justice requires.[130] This Code section applies only where the notice of appeal has been properly served either on the clerk of the court or on the adverse party within the time allowed by law.[131] If notice is served on a part of the adverse parties and is filed with the clerk, the court may permit the appellant, on terms, to perfect his appeal by serving a notice on the other adverse parties. But service on only a part of the adverse parties, and not on the clerk, does not authorize a nunc pro tunc order to perfect the appeal as to the adverse parties not served within the statutory time, but only as to the adverse parties served.[132] It seems to be "excusable neglect" where a defendant fails to serve a notice of appeal on a co-defendant.[133] If the notice is served on the clerk and an ineffectual attempt is made to serve it on the attorney by throwing the papers through an open transom over the door of his office, the court may permit service on the attorney after the time to appeal has expired.[134]

§ 2634. Person who must be served.

The notice of appeal must be served on the attorney of record of the adverse party. He is considered the attorney in

[129] Langdon v. Evans, 29 Hun, 652.

[130] This Code rule overrules Morris v. Morange, 17 Abb. Pr. 86, which was decided under the old Code.

[131] Hall v. City of New York, 79 App. Div. 102, 108, 79 N. Y. Supp. 979.

[132] Hall v. City of New York, 79 App. Div. 102, 108, 109, 79 N. Y. Supp. 979.

[133] Cooper v. Cooper, 76 App. Div. 221, 78 N. Y. Supp. 397.

[134] Claflin v. Du Bois, 15 State Rep. 963, 1 N. Y. Supp. 150.

the action for the purpose of serving on him a notice of appeal, until changed by the party and due notice given, which change may, however, be effected without any application to the court.[135] The notice may be served on attorneys who, though not the attorneys of record, have authority to admit service in the name of the party.[136] An attorney employed and appearing specially to obtain the vacation of an order cannot, after obtaining the vacating order, withdraw from the case, so as to prevent the service on him of a notice of appeal from the order.[137]

—— **Where attorney cannot be served.** "If the attorney for the adverse party is dead, or if he has been removed, and notice of the removal has been served upon the appellant's attorney, and another attorney has not been substituted in his place; or if, for any reason, service of a notice of appeal upon the proper attorney for the adverse party cannot, with due diligence, be made within the state, the notice of appeal may be served upon the respondent, in the manner prescribed by law for serving it upon an attorney. If personal service upon the respondent cannot, with due diligence, be so made within the state, the notice of appeal may be served upon him, and notice of the subsequent proceedings may be given to him, as directed by a judge of the court, in or to which the appeal is taken."[138] Except as provided in this Code section, a service on the party himself instead of on his attorney is insufficient;[139] and the objection that service was made on the party instead of on his attorney may be taken advantage of at any time provided the party has not appeared and proceeded in such a manner as to give the court jurisdiction.[140]

§ 2635. Mode of service.

The notice must be served as prescribed in the Code article[141]

135 Tripp v. De Bow, 5 How. Pr. 114.
136 Chase v. Bibbins, 71 N. Y. 592.
137 Graves v. Graham, 18 Misc. 600, 43 N. Y. Supp. 508.
138 Code Civ. Proc. § 1302.
139, 140 Tripp v. De Bow, 5 How. Pr. 114.
141 Code Civ. Proc. §§ 796–802.

relating to service of papers in general,[142] which Code provisions have been fully considered in a preceding volume.[143]

—— **Filing with clerk.** Service on the clerk should be made by filing the notice in his office.[144] Mailing the notice of appeal to the clerk of the court is not a legal service, unless the notice is actually received by him within the time limited by the Code in which to appeal.[145]

§ 2636. Time of service.

Of course, the notice must be served before the time to appeal expires.[146] If leave of court is necessary to authorize an appeal, the notice of appeal should not be served until after such leave is granted. A notice of appeal to the court of appeals from an order not appealable without leave of court will not support an appeal taken pursuant to leave of court subsequently granted.[147]

Under the old Code, in order to perfect an appeal to the court of appeals, it was necessary that the requisite undertaking should be executed before the notice of appeal was served, since a copy of the undertaking was required to be served with the notice of appeal. But under the present Code the notice of appeal may be served before any undertaking has been executed, though it does not become effectual for any purpose until an undertaking has been given.[148]

§ 2637. Compelling acceptance of service.

A late case holds that a special term has no power to set aside a notice of appeal to the appellate division nor to compel

142 Code Civ. Proc. § 1300.

143 Volume 1, pp. 653–670.

144 Code Civ. Proc. § 1300. Need not be served on clerk personally. Hoffenberth v. Muller, 12 Abb. Pr. (N. S.) 221.

145 Crittenden v. Adams, 5 How. Pr. 310; Morris v. Morange, 17 Abb. Pr. 86, 26 How. Pr. 247. Service of the notice on the clerk by mail, on the last day, is not good, where not received until a succeeding day. Van Clief v. Mersereau, 8 Abb. Pr. (N. S.) 193, note.

146 When appeal to be taken, see ante, §§ 2595–2600.

147 Steamship Richmond Hill Co. v. Seager, 160 N. Y. 312.

148 Raymond v. Richmond, 76 N. Y. 106.

its acceptance.[149] It has been held, however, that the party on whom a notice of appeal is served may be compelled to accept service though it contains a statement of an intention to bring up for review an order reviewable only by a separate appeal.[150] But defendant will not be compelled to accept service of a notice of appeal from an order denying a motion for a discovery where plaintiff is in default in the service of the complaint so as to entitle defendant to an order dismissing the action.[151]

§ 2638. Amendment.

Provided there is something to amend by,[152] a notice of appeal which is not misleading may be amended by the appellate court, so long as the amendment does not give a right of appeal after the time to appeal has elapsed. For instance, leave to amend the notice, so as to make it an appeal from a judgment instead of an order, will not be allowed after the time for taking an appeal from the judgment has expired.[153] So the court cannot amend a notice of appeal from a judgment by adding a statement that the appeal is also from an intermediate order[154] or an interlocutory judgment,[155] after the time to appeal from such order or interlocutory judgment has expired. But a notice of appeal to the court of appeals may be amended after the time for appealing has expired, by inserting therein, nunc pro tunc, a stipulation for judgment abso-

[149] Ziadi v. Interurban St. R. Co., 97 App. Div. 137, 89 N. Y. Supp. 606.

[150] Masor v. Jacobus, 84 N. Y. Supp. 270.

[151] Phillips v. Equitable Life Assur. Soc., 55 State Rep. 298, 26 N. Y. Supp. 523.

[152] People ex rel. Gemmill v. Eldridge, 7 How. Pr. 108.

[153] Biggert v. Nichols, 18 Misc. 596, 42 N. Y. Supp. 472. Amendment is proper before time to appeal from judgment has expired. Kent v. Sibley, 5 N. Y. Supp. 448.

[154] Piper v. Van Buren, 27 Hun, 384; Enos v. Thomas, 5 How. Pr. 361; Richards v. Price, 16 Civ. Proc. R. (Browne) 398, 3 N. Y. Supp. 941.

[155] Patterson v. McCann, 38 Hun, 531. See, also, Hoffman v. Manhattan R. Co., 149 N. Y. 599.

lute in case of affirmance.[156] Subject to the exception already noted, it seems that any defect in a notice of appeal may be amended, unless it is so gross that the court cannot be satisfied that the paper relied on as a notice was intended for an appeal in the action in question.[157] The notice may be amended nunc pro tunc time by inserting therein, as appellants, the names of the attorneys, the real parties in interest.[158] Where an appeal is taken from an interlocutory judgment after the entry of final judgment, and all the parties consent, the notice of appeal and other papers may be amended by including both judgments.[159]

§ 2639. Waiver of objections.

Defects which are not jurisdictional may be waived,[160] as by submitting the cause without objection.[161] Admission of due service of the notice of appeal is a waiver of the objection that it was not served within the time allowed for an appeal.[162] So if no motion is made to dismiss the appeal, and the respondent has treated the appeal as regularly taken, and has argued it on its merits, he has waived his right to object that the notice was not served in time.[163] But an admission by the attorney of due service of notice does not waive the objection that the notice was not served in time since even if it could be considered a waiver as to respondent's attorney it could not affect the notice served on the clerk.[164] So the failure to serve the notice in time is not waived by granting an extension of time

[156] Mott v. Lansing, 5 Lans. 516. The rule is otherwise, it seems, if consent to judgment absolute is intentionally omitted and persistently refused. Wilmore v. Flack, 96 N. Y. 512.

[157] Sherman v. Wells, 14 How. Pr. 522.

[158] Fraser v. Ward, 2 City Ct. R. 345.

[159] Simonson v. Wood, 18 Wkly. Dig. 383.

[160] Silsbee v. Gillespie, 9 Abb. Pr. (N. S.) 139.

[161] See Hill v. Burke, 62 N. Y. 111.

[162] Struver v. Ocean Ins. Co., 2 Hilt. 475, 9 Abb. Pr. 23.

[163] Pickersgill v. Read, 7 Hun, 636, followed in Ostrander v. Campbell, 20 State Rep. 806, 3 N. Y. Supp. 597.

[164] Waring v. Senior, 48 How. Pr. 226. Contra, Stubbs v. Stubbs, 11 Wkly. Dig. 243.

to make a case where the extension is asked for and granted on the supposition that the notice of appeal has been duly served.[165]

ART. III. SECURITY TO PERFECT APPEAL.

§ 2640. Necessity on appeal to the court of appeals.

Security must be given to perfect an appeal to the court of appeals[166] except in a case where it is specially prescribed by law that security is not necessary.[167] Where required, no appeal is perfected until the undertaking is filed and notice thereof given.[168]

The court cannot dispense with the giving of security to perfect the appeal,[169] though the giving of the undertaking may be waived by the written consent of the respondent.[170]

—— **Appeal by people or officer.** Upon an appeal, taken by the people of the state, or by a state officer, or board of state

[165] Durant v. Abendroth, 53 Super. Ct. (21 J. & S.) 15.

[166] "To render a notice of appeal, to the court of appeals, effectual, for any purpose, except in a case where it is specially prescribed by law that security is not necessary to perfect the appeal, the appellant must give a written undertaking, to the effect, that he will pay all costs and damages, which may be awarded against him on the appeal, not exceeding five hundred dollars. The appeal is perfected, when such an undertaking is given and a copy thereof, with notice of the filing thereof, is served, as prescribed in this title." Code Civ. Proc. § 1326; Guilfoyle v. Pierce, 22 App. Div. 131, 47 N. Y. Supp. 899. It is immaterial whether appeal is from judgment or order. Cowdin v. Teal, 67 N. Y. 581. If undertaking is not given appeal may be dismissed. See Reese v. Boese, 92 N. Y. 632; contra, Benedict & B. Mfg. Co. v. Thayer, 82 N. Y. 610.

[167] Code Civ. Proc. §§ 1326, 1333.

[168] Thompson v. Blanchard, 2 N. Y. (2 Comst.) 561. Architectural Iron Works v. City of Brooklyn, 85 N. Y. 652. Must be filed with clerk with whom judgment or order appealed from is entered. Code Civ. Proc. § 1307.

[169] Architectural Iron Works v. City of Brooklyn, 85 N. Y. 652.

[170] Code Civ. Proc. § 1305. An agreement in open court to waive security to perfect an appeal, where the appeal is afterwards treated as pending, precludes the respondent from objecting to the want of security. Lentilhon v. City of New York, 5 N. Y. Super. Ct. (3 Sandf.) 721.

officers, or a board of supervisors of a county, the service of the notice of appeal perfects the appeal, and stays the execution of the judgment or order appealed from, without an undertaking or other security.[171]

——**Appeal by domestic municipal corporation.** Upon an appeal taken by a domestic municipal corporation, the service of the notice of appeal perfects the appeal, and stays the execution of the judgment or order appealed from, without an undertaking or other security, except that, where an appeal is taken to the court of appeals, the appellate division, or the supreme court, the court in or from which the appeal is taken may, in its discretion, require security to be given. In that case, the form, nature, and extent of the security, not exceeding that which is required in a like case, from a natural person, and the time and manner in which it must be given, must be prescribed by the order of the court; and the mayor, comptroller, or counsel to the corporation, may execute, in behalf of the corporation, an undertaking, so required to be given.[172]

This Code rule applies, inter alia, to appeals by an officer of a domestic municipal corporation where he acts in his official capacity. For instance, an appeal taken by the head of an executive department from an order requiring him to perform an act in his official capacity is an appeal by a municipal corporation.[173] So is an appeal by a commissioner of public works from a judgment or order directing him, as such officer, to do some act affecting the corporate interests.[174] So the head of the department of bridges in New York city represents the corporation.[175]

[171] Code Civ. Proc. § 1313.

[172] Code Civ. Proc. § 1314. Applies, inter alia, to appeals from orders in mandamus proceedings. Matter of Croker v. Sturgis, 38 Misc. 596, 78 N. Y. Supp. 77.

[173] Matter of Croker v. Sturgis, 38 Misc. 596, 78 N. Y. Supp. 77, and cases cited.

[174] People ex rel. Standard Gas L. Co. v. Daly, 75 Hun, 186, 27 N. Y. Supp. 283.

[175] New York Mail & Newspaper Transp. Co. v. Shea, 30 App. Div. 374, 52 N. Y. Supp. 5.

§ 2641. Necessity on appeal to the appellate division or supreme court.

Security is not required to perfect an appeal to the appellate division of the supreme court from a judgment of the supreme court nor an appeal to the supreme court from an inferior court,[176] except where it is otherwise specially prescribed by law in appeals from orders in special proceedings.[177]

§ 2642. Form and contents.

The general rules as to the form and contents of an undertaking to stay proceedings,[178] in so far as applicable, apply to undertakings to perfect an appeal. The undertaking must be conditioned to pay "all costs and damages which may be awarded against him [appellant] on the appeal, not exceeding five hundred dollars."[179] The costs referred to are merely

[176] Code Civ. Proc. §§ 1341, 1343, 1351, 1360. To perfect appeal from city court of New York to appellate term, no security is required. Quigg v. International Shirt & Collar Co., 16 Misc. 39, 37 N. Y. Supp. 916.

[177] Code Civ. Proc. § 1360.

[178] See post, § 2671.

[179] Code Civ. Proc. § 1326. Undertaking conditioned to pay damages only is insufficient. Langley v. Warner, 1 N. Y. (1 Comst.) 606. Prior to Codes it was held that where an appeal was from two orders an undertaking given as if the appeal was from one order was insufficient. Schermerhorn v. Anderson, (1 Comst.) 1 N. Y. 430. It would seem that said rule still applies.

On appeal to the court of appeals from a judgment not directing the payment of money, appellant gave an undertaking to pay all damages which defendant might sustain by reason of the appeal, and that, if the judgment appealed from was affirmed, he would pay the sum recovered or directed to be paid by him by the judgment at special term, or the part thereof as to which it was affirmed or dismissed, and, if affirmed or dismissed, that he would pay the notes held by a certain defendant to the extent to which they had been declared by a judgment of the special term to be cash notes, not exceeding a certain sum. The court of appeals affirmed the judgment without costs. Held, that the undertaking, considered as a statutory one, created no liability, but that it could be enforced as a common-law obligation. Gein v. Little, 43 Misc. 421, 89 N. Y. Supp. 488.

the costs on appeal to the court of appeals,[180] while the damages mentioned are the damages which the court may award for delay.[181] Where an undertaking is given beyond what is required for the perfecting of the appeal, so much thereof as is in excess, unless a consideration therefor can be shown aliunde to exist, is without consideration and cannot be enforced.[182]

If the adverse party has died since the making of the order, or the rendering of the judgment, appealed from, or the judgment appealed from was rendered after his death, so that the appeal cannot be heard until the personal representatives or others have been substituted as the respondent, the undertaking must recite the fact of the adverse party's death.[183]

Where there is a dispute as to the character of the judgment and the appeal is to the court of appeals, the motion for an order fixing the amount of the undertaking to be given should be made before the appellate division.[184]

—— Form of undertaking to perfect appeal to the court of appeals.

Supreme court.
[Title of action.]

Whereas, on the ——— day of ———, 190—, in the supreme court, ———, the above-named plaintiff, recovered a judgment against ———, the above-named defendant, for ——— dollars, damages and costs;

And the said defendant feeling aggrieved thereby, intends to appeal herefrom to the court of appeals:

Now, therefore, we, ———, [banker], residing at No. ——— street in the city of ———, and ——— [farmer], residing at ———, do hereby jointly and severally undertake that the appellant will pay all costs and damages which may be awarded against him on said appeal, not exceeding five hundred dollars.

[Date.] [Signatures of sureties.]
[Venue.]

180 See post, § 2649.

181 Post v. Doremus, 60 N. Y. 371.

182 Post v. Doremus, 60 N. Y. 371; Mittnacht v. Kellermann, 105 N. Y. 461; Gein v. Little, 43 Misc. 421, 89 N. Y. Supp. 488.

183 Code Civ. Proc. § 1297.

184 Matter of Blair, 24 Civ. Proc. R. (Browne) 304, 33 N. Y. Supp. 440.

On this ——— day of ———, 190—, before me appeared ——— and ———, to me personally known to be the same persons described in, and who executed, the above undertaking, and severally acknowledged that they executed the same.

[Signature and official title of officer]

[Venue.]

——— being duly sworn, says that he is a resident of this state, and is a freeholder (or householder) therein, and is worth the sum of [twice the amount specified in the undertaking] one thousand ($1,000) dollars, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under execution.

[Jurat.] [Signature.]

[Add like affidavit of other surety, if there are two.]

—— **One or more undertakings.** The undertaking to perfect an appeal may be a separate instrument or may be combined with an undertaking to stay proceedings.[185] One undertaking given as if there was only one respondent is proper though there are several respondents in whose favor separate bills of costs have been taxed.[186]

—— **Form of undertaking to perfect appeal and to stay execution of a judgment for money.**

[Same as preceding form but add to body of undertaking, at the end thereof, the following:] and do also jointly and severally undertake that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the sum recovered or directed to be paid by the judgment, or the part thereof as to which it is affirmed.

[Date, signatures, etc., as in preceding form except that affidavit of sureties must be for more than $1,000.]

—— **Form of undertaking to perfect appeal and to stay execution of a judgment directing payment of money in instalments.**

Supreme court.

[Title of cause.]

Whereas, on the ——— day of ———, in the supreme court, ———, the above-named ———, recovered a judgment against ———, the

185 Code Civ. Proc. § 1334.

186 Weaver v. Ely, 1 Month. Law Bul. 83.

above-named ———, for ——— dollars, damages and costs, whereby the said ——— was directed to pay said damages in instalments as follows: [insert provisions of judgment].

And the said ———, feeling aggrieved thereby, intends to appeal to the ——— court:

Now, therefore, we, ———, [banker], residing at No. ——— street in the city of ———, and ———, [merchant], residing at No. ——— street in the city of ———, do hereby jointly and severally undertake that the appellant will pay all costs and damages which may be awarded against him on said appeal, not exceeding five hundred dollars; and do also jointly and severally undertake that the appellant, ———, will pay each instalment which becomes payable pending the appeal, or the part thereof as to which the judgment is affirmed, not exceeding the sum of ——— dollars.

[Date.] [Signatures.]

[Add acknowledgment and affidavit of sureties as in preceding forms.]

§ 2643. Sureties.

The Code rules relating to the sureties, the necessity of justification, etc., apply equally well to both undertakings to perfect an appeal and undertakings to stay proceedings. They are set forth and construed in the chapter on stay of proceedings.[187] Where sureties are excepted to, and do not justify, and neither new sureties or a new undertaking are given, the appeal may be dismissed.[188]

§ 2644. Service.

A copy of the undertaking, with a notice showing where it is filed, must be served on the attorney for the adverse party, with the notice of appeal, or before the expiration of the time to appeal.[189] The undertaking is usually served with the notice of appeal but it may be served at any time before the right to appeal expires. The notice of appeal is, however, of no effect until the undertaking is served. In other words there is no appeal pending until the undertaking is served.[190] It follows

[187] See post, §§ 2676–2678.

[188] See Liddy v. Long Island City, 102 N. Y. 726, where ten days was given to perfect appeal. See, also, Katz v. Kuhn, 9 Daly, 12.

[189] Code Civ. Proc. § 1334.

[190] Raymond v. Richmond, 76 N. Y. 106.

that the cause cannot be put on the calendar of the court of appeals until the undertaking is served.

§ 2645. New undertaking.

If the undertaking on an appeal to the court of appeals is insufficient and it is stipulated that a new undertaking be allowed to be filed within five days and, if not filed, the appeal to be dismissed, the dismissal of the appeal pursuant to such stipulation does not preclude the right of the appellant, within the statutory time, to take and perfect another appeal.[191]

The Code provision as to a new undertaking when the financial condition of one or both of the sureties becomes involved, as set forth and construed in a succeeding paragraph,[192] applies equally well to an undertaking to perfect an appeal.

§ 2646. Effect as perfecting appeal.

When a notice of appeal has been served, and the proper undertaking perfected, the case is so far removed to the court of appeals from the appellate division that the court of appeals can entertain any application, which the case, in its then condition, may render necessary.[193]

§ 2647. Vacating or setting aside.

A motion to set aside an undertaking on an appeal to the court of appeals should be made to that court.[194] But it will not be set aside, where sufficient to perfect an appeal to the court of appeals, because it is not sufficient as a stay of proceedings.[195]

§ 2648. Supplying omission to give.

Where the appellant omits, through mistake, inadvertence, or excusable neglect, to do any act necessary to perfect the ap-

191 Culliford v. Gadd, 135 N. Y. 632.
192 See post, § 2678.
193 Adams v. Fox, 27 N. Y. 640; Parks v. Murray, 109 N. Y. 646.
194 Morss v. Hasbrouck, 15 Wkly. Dig. 308.
195 Morss v. Hasbrouck, 15 Wkly. Dig. 308. This case disapproved, in part, in McElroy v. Mumford, 128 N. Y. 303, 311.

peal, the court in or to which the appeal is taken, on proof by affidavit of the facts, may, in its discretion, permit the omission to be supplied, or an amendment to be made, on such terms as justice requires.[196]

It has been held that an undertaking cannot be allowed to be filed nunc pro tunc to perfect an appeal to the court of appeals;[197] but it has also been held that the failure to give an undertaking, on appeal to the court of appeals, where the notice of appeal was given reasonably, in good faith, and under circumstances which show that the omission to give the undertaking was due to a reliance on an order dispensing with security on appeal, which order was invalid in so far as it dispensed with an undertaking "for costs," is excusable neglect, so that the omission may be supplied.[198]

§ 2649. Liability on undertaking.

Where an undertaking is given merely to perfect an appeal to the court of appeals, and not to operate as a stay, the liability thereon is limited to such costs as are taxed as costs of the appeal to the court of appeals, not to exceed five hundred dollars.[199] A reversal with direction for a new trial "with costs to abide the event" terminates all liability on the bond.[200]

The general rules as to actions on undertakings, and conditions precedent, as set forth in the article on undertakings to stay proceedings,[201] apply to actions on undertakings given to perfect an appeal.

§ 2650. Deposit in lieu of undertaking.

Where the appellant is required to give an undertaking, he may, in lieu thereof, deposit with the clerk, with whom the

[196] Code Civ. Proc. § 1303.

[197] Nelson v. Tenney, 113 N. Y. 616.

[198] Architectural Iron Works v. City of Brooklyn, 85 N. Y. 652.

[199] Is not liable for costs in all the courts, though such judgment is directed by the court of appeals. Bennett v. American Surety Co., 73 App. Div. 468, 77 N. Y. Supp. 207, following Post v. Doremus, 60 N. Y. 371 and Burdett v. Lowe, 85 N. Y. 241.

[200] Jackson v. Lawyers' Surety Co., 95 App. Div. 368, 88 N. Y. Supp. 576.

[201] See post, §§ 2687 et seq.

judgment or order appealed from is entered, a sum of money, equal to the amount for which the undertaking is required to be given. The deposit has the same effect as filing the undertaking, and notice that it has been made has the same effect as notice of the filing and service of a copy of the undertaking. The court, wherein the appeal is pending, may direct the mode in which money shall be kept and disposed of during the pendency, or after the determination of the appeal.[202]

It will be observed that this Code provision provides only for a deposit of "a sum of money."[203] The deposit must include, if a stay of proceedings is also desired in an action to recover money, not only the amount of the judgment appealed from but also security for the costs of the appeal.[204] The deposit, on an appeal to the appellate division, cannot be withdrawn after a reversal by the appellate division, where a further appeal is taken to the court of appeals, until the decision of the court of appeals.[205] But a deposit made on an appeal to the appellate division cannot be ordered, without the consent of the persons interested, to take the place of an undertaking on a further appeal to the court of appeals.[206] On a reversal, the fund is released from all liens except those created by judgment or assignment.[207]

—— Form of notice of deposit to perfect appeal.

[Title of cause.]

Please take notice that ———, the appellant, has, pursuant to section 1306 of the Code of Civil Procedure, deposited with the clerk of

[202] Code Civ. Proc. §§ 1306. This Code provision applies to appeals from a surrogate's court (Id., § 2575) and to appeals or from the city court of New York (Id., §§ 3190, 3192).

[203] The acceptance of any other substitute cannot be compelled. Field v. Leavitt, 37 Super. Ct. (5 J. & S.) 537.

[204] Pringle v. Leverich, 1 Civ. Proc. R. (1 McCarthy) 372. That respondent may stipulate for a deposit of less security than the statute requires, see Jesup v. Carnegie, 45 Super. Ct. (13 J. & S.) 310.

[205] Parsons v. Travis, 9 N. Y. Super. Ct. (2 Duer) 659; McIntyre v. Strong, 2 Civ. Proc. R. (Browne) 36, which held, however, that a portion of the deposit might be withdrawn where the appellate division had materially reduced the amount of the judgment.

[206] McIntyre v. Strong, 2 Civ. Proc. R. (Browne) 36.

[207] Jordan v. Volkening, 14 Hun, 118.

the county of ——— the sum of five hundred dollars, in lieu of the undertaking required by section 1326 of the Code of Civil Procedure, to perfect an appeal in the above-entitled action to the court of appeals from the judgment [or "order"] entered in said action on the ——— day of ———, 190—, in said clerk's office, pursuant to a decision of the appellate division.

[Date.] [Signature and office address of appellant's attorney.]
[Address.]

ART. IV. CURING DEFECTS IN TAKING AN APPEAL.

§ 2651. Code provision.

Section 1303 of the Code, in so far as it permits the correction of omissions in the service of the notice of appeal, has already been considered.[208] Said section further provides that where the appellant omits, through mistake, inadvertence, or excusable neglect, to do any act "necessary to perfect the appeal" or to stay the execution of the judgment or order appealed from, "the court in or to which the appeal is taken, on proof, by affidavit, of the facts, may, in its discretion, permit the omission to be supplied, or an amendment to be made, on such terms as justice requires."

The power conferred by this Code section, it will be observed, is to supply such omissions, or grant such amendments, as may be necessary to perfect the appeal already taken, and not to perfect another and different appeal or to transform the appeal actually taken into an appeal for another purpose.[209] The Code section is often invoked in support of an application to amend the undertaking given on appeal.[210]

This Code provision is the only one authorizing the court to supply defects in the proceedings necessary to perfect the appeal, where the appeal is from a court of record. It will be observed that the application for relief may be made either to the appellate court or to the court from which the appeal is

[208] See ante, § 2633.
[209] Thorn v. Roods, 47 Hun, 433. See, also, ante, §§ 2633, 2648.
[210] See ante, § 2648.

taken. The proof must be by affidavit which should clearly state the facts and excuse, if possible, any delay in moving for relief. The granting of relief is expressly declared to be discretionary, though as a matter of fact the application, in the absence of special circumstances, is usually granted as a matter of course.[211] Terms may be imposed as a condition of granting the relief.

[211] Travis v. Travis, 48 Hun, 343, 1 N. Y. Supp. 357.

CHAPTER VIII.

SECURITY TO STAY PROCEEDINGS.

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ART. I. MODE OF PROCURING.

(A) GENERAL RULES.

§ 2652. Right to stay and how obtained.

On appeals from final judgments, whether to the court of appeals, the appellate division, or to the supreme court from an inferior court, the perfecting the appeal does not, of itself, stay proceedings to collect the judgment,[1] except, in certain cases, where the appeal is taken by or in behalf of the people or a domestic municipal corporation.[2] In every other instance it is necessary either (1) to give the security prescribed by the Code as necessary to stay proceedings on appeals in certain actions,[3] except where such security is limited or dispensed with by the court;[4] or (2) to obtain an order for a stay of proceedings and comply with the conditions imposed by such order; or (3) to make a deposit in lieu of the undertaking required.[5] The security required on appeals from orders depends on the court to which, and from which, the appeal is taken, as will be noticed in a succeeding paragraph.[6]

[1] See Taft v. Marsily, 49 Hun, 163, 1 N. Y. Supp. 621; Steinback v. Diepenbrock, 5 App. Div. 208, 39 N. Y. Supp. 137.

[2] Code Civ. Proc. §§ 1313, 1314. See ante, § 2640.

[3] Code Civ. Proc. §§ 1327—1331.

[4] Code Civ. Proc. § 1312. See post, § 2655.

[5] Deposit in lieu of undertaking, see ante, § 2650.

[6] See infra, this section.

—— **Appeal to court of appeals.** If the appeal is to the court of appeals, from a judgment as to which the Code specially provides for an undertaking which will operate as a stay, it is necessary either to give the undertaking [7] or to make a deposit in lieu thereof,[8] unless the action is one in which the service of the notice of appeal of itself operates as a stay,[9] or unless the security has been limited or dispensed with by order of court.[10] If the Code requires a deposit of papers,[11] such deposit is a prerequisite to a stay, and a deposit of money in lieu thereof is not permissible. If the action is one in which the Code makes no provision for a stay, it is necessary to apply for an order to stay proceedings and to comply with the terms thereof, unless the action is one in which the notice of appeal is of itself a stay.

If the appeal is, by leave of court, from an order, a stay can be perfected only by an order allowing a stay and compliance with such order.

—— **Appeal to appellate division from supreme court.** If the appeal to the appellate division is from a final judgment of the supreme court, "the appellant may give the security, required to perfect an appeal to the court of appeals, from a judgment of the same amount, or to the same effect; and to stay the execution thereof. In that case, the execution of the judgment appealed from is stayed, as upon an appeal to the court of appeals, and subject to the same conditions." [12]

On such an appeal, however, the appellant may either give

[7] Code Civ. Proc. §§ 1327–1332. These Code sections apply irrespective of the court in which the action originated.

[8] Code Civ. Proc. § 1306. See post, § 2653, and ante, § 2650.

[9] Code Civ. Proc. §§ 1312, 1313. See ante, § 2640.

[10] Code Civ. Proc. § 1312. See post, § 2655.

[11] Code Civ. Proc. § 1330. See post, §§ 2660, 2662. Section 1328 of the Code (see post, § 2660) allows a deposit of papers "or" the giving of an undertaking.

[12] Code Civ. Proc. § 1352. This Code provision does not apply to interlocutory judgments. Hatton v. McFaddin, 16 State Rep. 944, 15 Civ. Proc. R. (Browne) 42, 2 N. Y. Supp. 194. The security must be that prescribed to "perfect an appeal" to the court of appeals and to "stay execution." Moak v. Hayes, 25 Hun, 316.

such security or, at his option, apply for an order directing a stay as authorized by section 1351 of the Code. Section 1351 provides, inter alia, that on an appeal to the appellate division from a judgment or order of the supreme court, the appeal, except where it is otherwise specially prescribed by law, i. e., in cases where the notice of appeal effects a stay, "does not stay the execution of the judgment or order appealed from; unless the court, in or from which the appeal is taken, or a judge thereof, makes an order directing such a stay. Such an order may be made, and may, from time to time, be modified, upon such terms, as to security or otherwise, as justice requires." [13]

If security is given, either as a condition of granting the order, or the security required to perfect an appeal to the court of appeals and to stay proceedings, the Code provisions relating to such security on an appeal to the court of appeals apply thereto as if the appellate division was specified in those provisions in place of the court of appeals, and a judge of the same court in the place of a judge of the court below.[14]

The appellate division may grant a stay of proceedings on any judgment or order of the supreme court from which an appeal is pending.[15]

—— **Appeal to supreme court from an inferior court.** If the appeal is to the supreme court from the "final judgment" of an inferior court, the same security must be given to stay proceedings as on an appeal to the court of appeals.[16] If the appeal is to the supreme court from an "order" of an inferior court, the appellate court, or a judge thereof, may direct a stay of the execution of the order, on such terms, as to security or otherwise, as justice requires.[17]

[13] Proceedings should not be stayed without security except where called for by the circumstances of the case. Sternbach v. Friedman, 29 App. Div. 480, 51 N. Y. Supp. 1068.

[14] Code Civ. Proc. § 1351. This section applies to an appeal from an order in a special proceeding, except as otherwise specially prescribed by law. Code Civ. Proc. § 1360. Granting of stay is discretionary. Wilson v. Grant, 59 How. Pr. 350.

[15] Code Civ. Proc. § 1348.

[16] Code Civ. Proc. § 1341.

[17] Code Civ. Proc. § 1343.

—— **Appeal from orders made in a special proceeding.** Except as otherwise specially prescribed by law,[18] the rules laid down relating to staying the execution of an order of the supreme court in an action which has been appealed to the appellate division, apply to an appeal to the appellate division from an order affecting a substantial right, made in a special proceeding, at a special or trial term of the supreme court, or by a justice thereof.[19]

§ 2653. Deposit in lieu of undertaking.

The Code rule as to a deposit in lieu of an undertaking, as set forth in a preceding paragraph,[20] applies to an undertaking given to stay proceedings as well as to an undertaking to perfect an appeal.

—— **Form of notice of deposit.**

[Title of cause.]

Please take notice that, on the ——— day of ———, 190—, A. X., the appellant in the above action, pursuant to section 1306 of the Code of Civil Procedure, deposited the sum of ——— dollars with the clerk of the county of ———, to stay execution of the judgment of the ——— court, from which an appeal has been taken to the ——— court until the hearing and decision of the appeal therefrom.

[Date.] [Signature, etc., of appellant's attorney.]

[Address.]

§ 2654. Stay pending application for leave to appeal to the court of appeals.

A party aggrieved by the decision of the appellate division, on presenting proof by affidavit that he intends to apply for leave to appeal to the court of appeals, where the action is one mentioned in subdivision two of section 191 of the Code, and

[18] Stay of final order awarding writ of prohibition, see Code Civ. Proc. § 2101. Stay of summary proceedings, see Id. § 2262. Stay of order granting writ of mandamus, see Id. §§ 2087, 2089. Stay in condemnation proceedings, see Id. §§ 3375, 3376.

[19] Code Civ. Proc. § 1360.

[20] See ante, § 2650.

on proof that an undertaking has been filed, is entitled to an order staying all proceedings to enforce such judgment, until the granting or refusal of such leave to appeal by such appellate division or a judge of the court of appeals. The party desiring to make such application must do so at the same term or at the term of said appellate division next succeeding that at which judgment of affirmance was rendered and notice of entry thereof served on the party aggrieved, and in case said appellate division refuses said application, then such party shall have thirty days from and after service of a copy of the order of refusal, with notice of entry, in which to apply to a judge of the court of appeals, to be allowed to so appeal.[21]

§ 2655. Power of court to limit or dispense with security.

Where an appeal is taken to the court of appeals or to the appellate division from an order or judgment of the supreme court, the court in or from which the appeal is taken, or, where an appeal is taken to the supreme court from an inferior court, or from a final order in a special proceeding, "the court to which the appeal is taken may, in its discretion, make an order upon notice to the respondent dispensing with or limiting the security required to stay the execution of the judgment or order appealed from as follows:

"1. Where the appellant is an executor, administrator, trustee, or other person acting in another's right,[22] the security may be dispensed with or limited, in the discretion of the court.[23]

[21] Code Civ. Proc. § 1310. This provision was added by amendment in 1898.

[22] The committee of a lunatic who is sued individually and as a committee, for an accounting, is not acting "in another's right" where he seeks to appeal from the judgment against him individually and as a committee. Butler v. Jarvis, 117 N. Y. 115.

[23] A want of assets sufficient to pay the judgment is a good reason why an executor should be allowed to give an undertaking for a sum not in excess of the amount of assets disclosed which are applicable to the payment of the judgment appealed from. Mills v. Forbes, 12 How. Pr. 466.

"2. The aggregate sum in which one or more undertakings are required to be given may be limited to not less than $50,000, where it would otherwise exceed that sum." [24]

Subdivision two is not limited to a case where the appellant is an "executor, administrator, trustee, or other person acting in another's right." [25]

This Code provision does not authorize the dispensing with an undertaking to perfect an appeal to the court of appeals but relates merely to the security required to stay proceedings.[26]

It will be noticed that an application cannot be made to the court of appeals though the appeal is to that court.[27] In the first two classes of appeals enumerated, the application must be "to the court in or from which the appeal is taken;" in the last two, it must be "to the court to which the appeal is taken." The application should not be made before the appeal is perfected.[28] The Code provision is not mandatory.

The right to move is waived by depositing, pursuant to stipulation, bonds to an amount less than the amount of security required by the Code.[29]

§ 2656. Waiver of security.

An undertaking which the appellant is required to give, or any other act which he is required to do, for the security of the respondent, may be waived by the written consent of the respondent.[30]

—— Form of waiver of security on appeal.

[Title of cause.]

The giving of an undertaking, or other security, by the appellant, on the appeal to the ——— court from the final judgment of the ———

[24] Code Civ. Proc. § 1312.

[25] National Contracting Co. v. Hudson River Water Power Co., 47 Misc. 491, 94 N. Y. Supp. 187.

[26] Architectural Iron Works v. City of Brooklyn, 85 N. Y. 652.

[27] Hills v. Peekskill Sav. Bank, 95 N. Y. 675.

[28] National Contracting Co. v. Hudson River Water Power Co., 47 Misc. 491, 94 N. Y. Supp. 187.

[29] Jesup v. Carnegie, 45 Super. Ct. (13 J. & S.) 310.

[30] Code Civ. Proc. § 1305.

court in the above-entitled action, in favor of ——— against ———, for ———, is hereby waived, and the proceedings on the judgment appealed from are stayed without such undertaking being given.

[Date.] [Signature and office address of respondent's attorney.]

§ 2657. Supplying omissions.

Where the appellant omits, through mistake, inadvertence, or excusable neglect, to do any act necessary to stay the execution of the judgment or order appealed from, the court, in or to which the appeal is taken, on proof, by affidavit, of the facts, may, in its discretion, permit the omission to be supplied, or an amendment to be made, on such terms as justice requires.[31]

(B) SECURITY REQUIRED BY CODE.

§ 2658. General considerations.

Sections 1327 to 1333 of the Code fix the security necessary to stay proceedings on appeal to the court of appeals from certain specified judgments or orders, subject to the general rules relating to the necessity of security and the limiting or dispensing therewith. On an appeal from a judgment or order enumerated in either of said Code provisions, no order to stay proceedings is necessary, but the giving of the security of itself effectuates a stay. They do not, however, extend to a case where it is specially prescribed by law that the execution of a judgment or order appealed from may be stayed, without security, or where the security to be given is specially regulated by law.[32]

Though these provisions are contained in the chapter relating to appeals to the court of appeals, their application is extended by the Code to appeals from final judgments to the appellate division [33] and to the supreme court from an inferior court.[34] The fact is to be kept in mind, however, that if the

[31] Code Civ. Proc. § 1303.
[32] Code Civ. Proc. § 1333.
[33] Code Civ. Proc. § 1351.
[34] Code Civ. Proc. § 1341.

appeal is to the appellate division from a judgment of the supreme court the undertakings specified in this division must, in addition to the Code requirements, be conditioned to pay the costs and damages of the appeal, not to exceed five hundred dollars.[35]

§ 2659. Appeal from judgment for the recovery of money only.

"If the appeal is taken from a judgment for a sum of money, or from a judgment or order directing the payment of a sum of money, it does not stay the execution of the judgment or order until the appellant gives a written undertaking to the effect that if the judgment or order appealed from, or any part thereof, is affirmed, or the appeal is dismissed, he will pay the sum recovered or directed to be paid by the judgment or order or the part thereof as to which it is affirmed. But where the judgment or order directs the payment of money in fixed instalments, the undertaking must be to the effect that the appellant will pay each instalment which becomes payable pending the appeal, or the part thereof as to which the judgment or order is affirmed, not exceeding a sum specified in the undertaking, which must be fixed by a judge of the court below. The court below may at any time afterwards, upon satisfactory proof, by affidavit, that the sum so fixed is insufficient in amount, make an order requiring the appellant to give a further undertaking, to the same effect, in a sum and within a time, specified in the order. A failure to comply with such an order has the same effect as if no undertaking has been given, as prescribed in this section." [36]

This Code provision applies only where a specific or certain sum of money is directed to be paid or recovered by the judgment.[37] In other words, an undertaking given pursuant to

[35] Code Civ. Proc. § 1352.

[36] Code Civ. Proc. § 1327. That an undertaking given under this Code provision will not stay the operation of a judgment awarding an injunction and damages, see post, § 2693.

[37] Does not apply to judgment directing payment of sum to be made

this section is insufficient as a stay where the judgment requires the doing of acts in addition to the payment of money.[38] For instance, this provision does not fix the security that may be given to stay proceedings on an appeal from a judgment granting an injunction though it also awards damages.[39] It does not apply to a judgment directing the payment of money out of a fund in court,[40] nor to a foreclosure judgment for a deficiency.[41] But a judgment of affirmance of a judgment for the recovery of money only is within this provision.[42]

An undertaking to pay the sum recovered or directed to be paid by the "affirmance" instead of by the "judgment or order" is not a compliance with this Code provision.[43]

—— **New undertaking.** Where the appeal is from a judgment or order directing the payment of a sum of money in fixed instalments, and an undertaking is given to stay proceedings, pursuant to section 1327 of the Code, the court below, at any time afterwards, on satisfactory proof, by affidavit, that the sum fixed in the original undertaking is insufficient in amount, may make an order requiring the appellant to give a further undertaking to the same effect, in a sum and within a time specified in the order. A failure to comply with such an order has the same effect as if no undertaking has been given.[44]

out of sale of land. Knapp v. Van Etten, 55 Hun, 428, 8 N. Y. Supp. 415. Judgment in action to set aside assignment for creditors was held within this provision in Durant v. Pierson, 19 Civ. Proc. R. (Browne) 203, 12 N. Y. Supp. 145.

[38] Galusha v. Galusha, 108 N. Y. 114.

[39] Eno v. New York El. R. Co., 15 App. Div. 336, 44 N. Y. Supp. 61, following Genet v. Delaware & Hudson Canal Co., 113 N. Y. 475.

[40] In such a case the security to be given rests in the sound discretion of the court. Curtis v. Leavitt, 1 Abb. Pr. 274; Steinback v. Diepenbrock, 5 App. Div. 208, 39 N. Y. Supp. 137. Rule was otherwise in chancery and under old Code Id., followed in Dwyer v. Rorke, 8 App. Div. 617, 40 N. Y. Supp. 934.

[41] Grow v. Garlock, 29 Hun, 598.

[42] McElroy v. Mumford, 128 N. Y. 303, 311, construing Code Civ. Proc. § 1332.

[43] Hollister v. McNeill, 31 Hun, 629.

[44] Code Civ. Proc. § 1327.

§ 2660. Appeal from judgment for assignment or delivery of personal property.

If the appeal is taken from a judgment or order directing the assignment or delivery of a document or of personal property, it does not stay the execution of the judgment or order until the thing directed to be assigned or delivered is brought into the court below or placed in the custody of an officer or receiver designated by that court, or, if the appeal is from a judgment for the recovery of a chattel, the appellant gives a written undertaking in a sum fixed by the court below, or a judge thereof, to the effect that the appellant will obey the direction of the appellate court, on the appeal.[45]

It will be observed that it is optional with the appellant whether to bring the chattel into court to be placed in the custody of an officer or to give the undertaking.

Where defendant, who appeals from a judgment against him, in an action to redeem from a mortgage, is required to file with the clerk a discharge of the mortgage to be delivered to the plaintiff in case of affirmance, the latter should be required to pay into court, the sum tendered, in case defendant does not accept it for the ultimate security of defendant.[46]

The decisions construing the clause relating to an undertaking will be found in the next paragraph.

§ 2661. Appeal from judgment for the recovery of a chattel.

If the appeal is taken from a judgment for the recovery of a chattel, it does not stay the execution of the judgment until the appellant gives a written undertaking, in a sum fixed by the court below, or a judge thereof, to the effect that the appellant will obey the direction of the appellate court on the appeal.[47]

[45] Code Civ. Proc. § 1328. Judgment directing delivery of shares of stock is within this Code section. Dady v. O'Rouke, 65 App. Div. 465, 72 N. Y. Supp. 827. So is a judgment directing payment over of money in the hands of a receiver. Bank of Havana v. Moore, 8 Wkly. Dig. 198.

[46] Simson v. Chadwick, 20 Wkly. Dig. 35

[47] Code Civ. Proc. § 1329. Liability where common-law undertaking

The stay is a matter of right and the granting thereof is not discretionary.[48] In other words, the judge cannot prevent a stay by refusing to fix the amount of the undertaking at any sum, though the sum to be fixed is a matter of discretion.[49] An approval of the undertaking by the court is, however, equivalent to a fixing of the amount thereof.[50]

—— Form of undertaking.

[Title of cause.]

Whereas, on the ——— day of ———, 190—, A. X., the above-named plaintiff, recovered a judgment in the ——— court against B. R., the above-named defendant, awarding the plaintiff the possession of certain chattels, with ——— dollars damages and costs;

And the said defendant, feeling aggrieved thereby, intends to appeal to the ——— court;

And the ——— court (or "Hon. ———, a judge of the ——— court") having fixed the amount of the undertaking at ——— dollars;

Now, therefore, we, A. X, [etc., as in preceding forms under § 2642] do hereby jointly and severally undertake, in the sum of ——— dollars, that the appellant will obey the direction of the ——— court on this appeal.

[Date, signature, etc., as in preceding forms under § 2642.]

§ 2662. Appeal from a judgment directing execution of instrument.

"If the appeal is taken from a judgment or order, directing the execution of a conveyance or other instrument, it does not stay the execution of the judgment or order, until the instrument is executed, and deposited with the clerk, with whom the judgment or order is entered, to abide the direction of the appellate court." [51]

is given instead of statutory undertaking, see Goodwin v. Bunzl, 102 N. Y. 224.

[48] Dady v. O'Rourke, 65 App. Div. 465, 72 N. Y. Supp. 827.

[49] Dady v. O'Rourke, 65 App. Div. 465, 72 N. Y. Supp. 827; Montefelore v. Favilla, 63 How. Pr. 386.

[50] Dunseith v. Linke, 10 Daly, 363. So held though no sum was stated in the binding part of the undertaking. Id.

[51] Code Civ. Proc. § 1330; Waring v. Ayres, 12 Abb. Pr. 112; Bank of Havana v. Moore, 8 Wkly. Dig. 198.

This Code provision has been applied where a judgment in a divorce suit awarded alimony to be secured by a mortgage on real estate.[52] Formerly, it applied only to appeals from final judgments,[53] but now it applies to an appeal from a "judgment or order."

§ 2663. Appeal from judgment for sale, or delivery of possession, of real property.

If the judgment or order (1) directs the sale or the delivery of the possession of real property, or (2) entitles the respondent to the immediate possession thereof, an appeal does not stay the execution of the judgment or order, until the appellant gives a written undertaking to the effect that he will not, while in possession of the property, commit, or suffer to be committed, any waste thereon; and if the property is in his possession or under his control, the undertaking must also provide that if the judgment or order is affirmed or the appeal is dismissed, and there is a deficiency on the sale, he will pay the value of the use and occupation of the property, or the part thereof, as to which the judgment or order is affirmed, from the time of taking the appeal until the delivery of the possession thereof, pursuant to the judgment or order, not exceeding a specified sum fixed by a judge of the court below. If the judgment directs a sale of real property on the foreclosure of a mortgage, and an appeal is taken by a party against whom payment of the deficiency is awarded, the undertaking must "also" provide that if the judgment is affirmed or the appeal is dismissed, the appellant will pay any deficiency which may occur on the sale, with interest and costs, and all expenses chargeable against the proceeds of the sale, not exceeding a sum fixed by a judge of the court below.[54]

[52] Galusha v. Galusha, 108 N. Y. 114.

[53] Hatton v. McFaddin, 15 Civ. Proc. R. (Browne) 42, 16 State Rep. 944, 2 N. Y. Supp. 194.

[54] Code Civ. Proc. § 1331. Liability where common-law undertaking given in foreclosure suit, under section 1327 of the Code, see Concordia Sav. & Aid Ass'n v. Read, 124 N. Y. 189. Stay does not exist until

This Code provision, prior to its amendment in 1897, was much more obscure than it is at present. Prior to such amendment it was held that a party appealing from a judgment directing a sale on foreclosure of a mortgage might give an undertaking conditioned either against waste and to pay for use and occupation, or to pay the deficiency, but that he need not give both;[55] but now, if the appellant is in possession and a deficiency judgment is awarded against him, he must give an undertaking covering waste, use, and occupation, and deficiency. It is not entirely clear, under the Code provision as it now stands, as to when an undertaking conditioned merely against waste is proper, unless it is when the appellant is not in possession at the time of taking the appeal. If he is not in possession and is held liable to pay any deficiency judgment, a strict reading of the Code provision requires that the undertaking be conditioned against waste and to pay any deficiency, though it has been said that in such a case an undertaking conditioned only to pay such deficiency is sufficient,[56] and a common sense view of the situation would seem to support such holding.

This Code provision applies only to those cases where real estate alone is the subject-matter affected by the judgment.[57] It does not apply to an appeal from an order made long after a judgment of foreclosure,[58] nor does it apply to a judgment in part restraining the appellant from further use of the premises.[59]

a perfected appeal has been taken. Guilfoyle v. Pierce, 22 App. Div. 131, 47 N. Y. Supp. 899.

[55] Grow v. Garlock, 29 Hun, 598, approved and followed in Werner v. Tuch, 119 N. Y. 632.

[56] Mutual Life Ins. Co. v. Robinson, 23 Misc. 563, 52 N. Y. Supp. 795.

[57] Does not apply where the sale of both real and personal property is directed by the judgment appealed from. New York Security & Trust Co. v. Saratoga Gas & Electric Light Co., 5 App. Div. 535, 39 N. Y. Supp. 486.

[58] Appeal from order directing a resale of premises sold under a mortgage foreclosure. Stephens v. Humphries, 49 State Rep. 782, 20 N. Y. Supp. 812.

[59] Troy & B. R. Co. v. Boston & H. I. & W. R. Co., 57 How. Pr. 181.

An undertaking, on appeal to the appellate division, conditioned that "during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon," extends to waste committed pending a subsequent appeal to the court of appeals.[60]

An application to fix the amount of the security is proper only where the appellant is in possession of the realty affected by the judgment appealed from,[61] or where a judgment of deficiency is awarded by the judgment against the party applying.[62] The application should be based on affidavits showing the condition of the cause, the condition and value of the property, the rental value, etc. The liability is limited to the amount specified by the judge of the court from which the appeal is taken.[63]

It has been held that if a party is one not enumerated in any of the subdivisions of this Code section, he must apply to the court or a judge for a stay,[64] but a strict reading, as heretofore said, would seem to embrace within its provisions all classes of parties, whether or not in possession.

—— Form of undertaking.

[Title of cause.]

Whereas, on the ——— day of ———, 190—, in the ——— court, A. X., the above-named plaintiff, recovered a judgment against B. Z., the above-named defendant, for ——— [state relief granted so as to bring case within Code provision]; [65]

And the said defendant feeling aggrieved thereby intends to appeal to the ——— court;

Now, therefore, we, C. Y. [merchant], residing at No. ——— street in the city of ———, and D. G. [farmer] residing at ———, hereby

[60] Church v. Simmons, 83 N. Y. 261.

[61] Commercial Bank v. Foltz, 35 App. Div. 237, 54 N. Y. Supp. 764.

[62] Rosenbaum v. Tobler, 31 App. Div. 312, 53 N. Y. Supp. 722.

[63] Hoag v. Prime, 24 State Rep. 476, 5 N. Y. Supp. 502.

[64] Purchasers subsequent to the mortgage, not in possession, are not within this Code provision, but may be granted a stay, on furnishing the same security as required if they were in possession. Mutual Life Ins. Co. v. Robinson, 23 Misc. 563, 52 N. Y. Supp. 795.

[65] If the undertaking is given in a mortgage foreclosure suit it is sufficient to merely state "for the foreclosure and sale of real property

jointly and severally undertake that the appellant will not, while in possession of such real property, commit, or suffer to be committed, any waste thereon; and that if the judgment appealed from be affirmed, or the appeal be dismissed, the said appellant will pay the value of the use and occupation of said property, or the part thereof as to which said judgment shall be affirmed, from the time of taking said appeal until the delivery of the possession thereof pursuant to said judgment, not exceeding the sum of ——— dollars; [and also that if the judgment appealed from be affirmed, or the appeal be dismissed, the said appellant will pay any deficiency which may occur on the sale in discharging the sum to pay which the sale is directed, with interest, and the costs, and all expenses chargeable against the proceeds of the sale, not exceeding the sum of ——— dollars].[66]

[Date, signature, etc., as in preceding forms.]

§ 2664. Appeal from judgment of affirmance.

Where the judgment or order, from which an appeal is taken to the court of appeals, affirms a judgment or order specified in either of sections 1327 to 1331, inclusive, of the Code, the undertaking must be the same as if the judgment or order from which the appeal is so taken was to the same effect as the judgment or order affirmed.[67]

To clearly understand this Code provision it is necessary to refer to the last sentence in section 1317 of the Code which provides that "a judgment, affirming wholly or partly a judgment, from which an appeal has been taken, shall not, expressly and in terms, award to the respondent, a sum of money, or other relief, which was awarded to him by the judgment so affirmed." Now if the first mentioned provision was not contained in the Code a question might arise, when an appeal is taken to the court of appeals, as to whether the judgment ap-

mortgaged." If given in an ejectment action, it is sufficient to state that the judgment is for "the delivery to plaintiff of immediate possession of the property described in said judgment."

[66] The matter in brackets is necessary only where the undertaking is given to stay a sale under a mortgage foreclosure, in behalf of a party required by the judgment to pay any deficiency.

[67] Code Civ. Proc. § 1332. This Code provision was framed in accordance with Hinckley v. Kreitz, 58 N. Y. 583.

pealed from is one of the judgments mentioned in sections 1327 to 1331 of the Code. In other words, a judgment of affirmance, not awarding any relief, is not, except by virtue of this Code provision, necessarily a judgment for the recovery of money only, or for the recovery of a chattel, or for the sale or possession of real property, because the judgment of the trial court is such a judgment. To illustrate: under this provision, if the judgment affirmed required the payment of money, the order of affirmance must be treated as though it had directed the payment of the same sum as that provided for by the original judgment, and an undertaking given on appeal from the judgment of affirmance will have the same effect as though the judgment of affirmance had expressly directed the payment of the sum included in the original judgment.[68]

§ 2665. Appeal from judgment for specific performance or setting aside conveyance.

When the appeal is from a judgment in favor of the owner of real estate, in an action to set aside the conveyance thereof, or to compel the specific performance of a contract for the sale thereof, such owner shall have the same right to sell or dispose of the same as though no appeal had been taken, unless the appellant shall file with the clerk of the court a written undertaking, in a sum fixed by the court or a judge thereof, upon a notice to the respondent of at least ten days, and to be approved by such court or judge, to the effect that the appellant will, in case the judgment appealed from shall be affirmed, pay to such owner such damages as he may suffer by reason of such appeal, not exceeding the amount of the penalty in such undertaking. Such undertaking may be filed at any time during the appeal, but any sale of such real estate or contract to sell the same in good faith and for a valuable consideration, after said judgment and before the filing of such undertaking, shall be as valid as if such undertaking had not been filed. In case such undertaking shall not be filed, the respondent shall be entitled, at any time during such appeal, to an order discharging

[68] McElroy v. Mumford, 128 N. Y. 303, 310.

of record any notice of pendency of action filed in the action, and also canceling and discharging of record said contract, in case the same has been recorded.[69]

(C) ORDER GRANTING STAY.

§ 2666. Necessity.

In some cases, as already noticed, a stay may be obtained by merely giving an undertaking, but in cases where no special provision is made by the Code for a particular kind of undertaking, it is not sufficient to merely give an undertaking but it is necessary to obtain an order granting a stay.[70] Merely giving an undertaking, without an order of court directing a stay, does not operate as a stay, "except where it is otherwise specially prescribed by law."[71]

A stay cannot be obtained in an action for dower unless the court or a judge thereof grants an order directing a stay, and the respondent may prevent the granting of the order by giving an undertaking.[72]

§ 2667. Power of court or judge.

The Code does not abridge the power of the court over its own judgments, to stay proceedings on them for such time and on such terms as to the court seems proper.[73] In other words, the fact that the Code secures to the appellant in a certain class of actions the right to a stay, on giving an undertaking, and has omitted to secure a similar right in other actions, does not preclude the right of the court or a judge to grant such a

[69] Code Civ. Proc. § 1323. In 1899 this provision was amended to include actions to set aside a conveyance of real estate.

[70] Taft v. Marsily, 14 Civ. Proc.. R (Browne) 415, 1 N. Y. 446. Stay may be granted on appeal from an interlocutory order in a special proceeding, where it affects a substantial right. Manhattan R. Co. v. O'Sullivan, 16 Misc. 150, 37 N. Y. Supp. 1063.

[71] For instance, an undertaking is not, of itself, a stay, on an appeal from an order denying a new trial on the judge's minutes. Carter v. Hodge, 150 N. Y. 532.

[72] See Code Civ. Proc. § 1616.

[73] Granger v. Craig, 85 N. Y. 619. Discretion is not reviewable unless abused.

stay, in the exercise of inherent power.[74] And the trial court may go further than to merely order a stay of proceedings in behalf of the successful party, by suspending the operation of the judgment, where a mere stay would not be effectual, as where the judgment grants an injunction.[75] But while, in such a case, the special term has "power," on motion, to "suspend the operation" of its judgment pending an appeal,[76] and the appellate division, on appeal from the order, may review the exercise of the discretion as to the propriety of the stay,[77] yet a comparatively recent case holds that the better practice is to make the motion in the appellate division.[78]

A special term has power to grant a stay, pending an appeal to the court of appeals, on condition that appellant give an additional bond.[79]

A judge out of court has power to order a stay,[80] and this is so although an appeal has been taken to the court of appeals.[81]

As already stated, the appellate division "may grant a stay of proceedings upon any judgment or order of the supreme court from which an appeal is pending."[82]

The stay may be granted at any time pending the appeal.[83]

§ 2668. Motion papers.

The motion may be made ex parte.[84] The affidavits should show the nature of the action, the condition of the action, the

[74] Mutual Life Ins. Co. v. Robinson, 23 Misc. 563, 52 N. Y. Supp. 795.

[75] Genet v. Delaware & Hudson Canal Co., 113 N. Y. 472.

[76] Genet v. Delaware & Hudson Canal Co., 113 N. Y. 475. Especially is this so where, by so doing, the parties are left in the position which they were when the action was brought. Id., followed in Eno v. New York El. R. Co., 15 App. Div. 336, 44 N. Y. Supp. 61.

[77] Genet v. Delaware & Hudson Canal Co., 113 N. Y. 475.

[78] Eno v. New York El. R. Co., 15 App. Div. 336, 44 N. Y. Supp. 61.

[79] Kager v. Brenneman, 52 App. Div. 446, 65 N Y. Supp. 129.

[80] Code Civ. Proc. § 775; Mutual Life Ins. Co. v. Robinson, 23 Misc. 563, 52 N. Y. Supp. 795.

[81] Laney v. Rochester R. Co., 81 Hun, 346, 30 N. Y. Supp. 893.

[82] Code Civ. Proc. § 1348.

[83] Culver v. Hollister, 29 How. Pr. 479.

[84] Code Civ. Proc. § 775.

taking of an appeal, and any other facts pertinent to a determination as to the conditions on which a stay should be granted. The report or decision, with the exceptions thereto, if the action was tried without a jury, and the case, if one has been made, should be presented, in order that it may be seen whether there is probable cause for review.[85] An order to show cause is properly made if there is a question as to whether any stay at all should be granted.

—— Form of affidavit.

[Title of cause.]

[Venue.]

A. X., being duly sworn, says:

I. That he is ———.

II. That the above-entitled action was brought to [state nature of action].

III. [State condition of action.]

IV. That an appeal has been taken [or "is about to be taken"] by ——— from a judgment of the ——— court, entered in the ——— county clerk's office, on the ——— day of ———, 190—, in favor of ——— against ——— for ——— [or "an order of the ——— court, made at a ——— term thereof, on the ——— day of ———, 190—, directing that ———"].

V. That deponent will suffer serious inconvenience and loss if the execution of said judgment [or "order"] is not stayed until the decision of said appeal, for the following reasons, viz: ———.

[Jurat.] [Signature.]

§ 2669. Propriety of granting of stay.

Whether a stay shall be granted is a matter of discretion,[86] though ordinarily the motion is granted as of course and the only question is as to the terms to be imposed. It would seem, however, that where a stay can be granted without an order by giving an undertaking, a stay will not be granted by order where no circumstances exist which call for a different undertaking from that required by the statute.[87] If a stay is granted,

[85] Otis v. Spencer, 8 How. Pr. 171.

[86] Coleman v. Phelps, 24 Hun, 320; Wilson v. Grant, 59 How. Pr. 350.

[87] So held where judgment was for costs. Campbell & Thayer Co. v. Frost, 24 Misc. 87, 52 N. Y. Supp. 487.

in such a case, the terms of the undertaking are usually required to correspond closely to those in a like action where the undertaking is given without an order, in the absence of special circumstances. A stay will not be granted on an appeal to the court of appeals where it can be obtained by simply giving security.

A stay is properly refused where it clearly appears that there is no merit in the appeal, as where it is shown to be taken solely for delay.[88] In short, a stay will not be granted where there is no necessity therefor because, on the face of the moving papers, the appeal must be fruitless.[89] And if the complaint is dismissed in an action to restrain the foreclosure of a mortgage, a motion for a stay of proceedings pending an appeal therefrom will not be granted, since in effect, a stay would grant an injunction pending appeal which injunction was denied by the judgment.[90] So a stay of proceedings will not be granted where several years have elapsed since the rendition and entry of the judgment, of which the moving party had knowledge, and where he has not taken an appeal.[91] So a stay should not be granted where the party whom it is sought to stay has no interest in the question involved in the order appealed from.[92]

Where an order grants a new trial unless plaintiff stipulates within twenty days to reduce the verdict to a specified sum, and both parties appeal from the order, it is proper to grant to plaintiff a stay of proceedings and an extension of the time to stipulate to twenty days after the determination of the appeal.[93]

[88] Emigrant Mission Committee v. Brooklyn El. R. Co., 40 App. Div. 611, 57 N. Y. Supp. 624.

[89] Connolly v. Manhattan R. Co., 7 App. Div. 610, 40 N. Y. Supp. 1007.

[90] Pocantico Water Works Co. v. Low, 21 Misc. 172, 47 N. Y. Supp. 72. To same effect, Campbell & Thayer Co. v. Frost, 24 Misc. 87, 52 N. Y. Supp. 487.

[91] Bauer v. Parker, 47 App. Div. 623, 61 N. Y. Supp. 1023.

[92] People v. Alker, 12 Hun, 88.

[93] Cullen v. William E. Uptegrove & Bros., 101 App. Div. 147, 34 Civ. Proc. R. 181, 91 N. Y. Supp. 511.

§ 2670. Order.

The Code provides that where a motion is made for a stay on an appeal to the supreme court from an order of an inferior court,[94] or on an appeal to the appellate division from a judgment or order of the supreme court,[95] the order may direct such a stay, on such terms, as to security or otherwise, as justice requires. The inherent power to order a stay in other cases would seem to be as broad as the power conferred by these Code sections. But while the court has "power" to stay the proceedings without security, such power should not be exercised except where called for by the circumstances of the case.[96] A stay without security may be ordered where the appellant is the owner of fixed property amply sufficient to pay or otherwise perform the judgment if affirmed.[97] Even if security is not required as a condition of granting a stay on an appeal to the appellate division from a judgment or order of the supreme court, it may be required afterward, in a proper case.[98]

If security is required, it should be such as necessary to protect respondent's interests.[99]

Granting a stay on appeal from a judgment for foreclosure, on condition that defendant waive his defense of tender, is an abuse of discretion.[100]

An order granting a stay, pending an appeal to the court of appeals, is too broad where it contains no provision for the termination of the stay if an appeal should not be taken or if the judgment should be affirmed by the court of appeals.[101]

[94] Code Civ. Proc. § 1343.

[95] Code Civ. Proc. §§ 1351, 1360.

[96] Sternbach v. Friedman, 29 App. Div. 480, 51 N. Y. Supp. 1068; Otis v. Spencer, 8 How. Pr. 171. See, also, Christy v. Libby, 3 Abb. Pr. (N. S.) 423; Clark v. Brooks, 2 Abb. Pr. (N. S.) 385; People v. Nolan, 63 How. Pr. 373.

[97] Polhamus v. Moser, 30 N. Y. Super. Ct. (7 Rob.) 443.

[98] Code Civ. Proc. § 1351.

[99] Taft v. Marsily, 14 Civ. Proc. R. (Browne) 415.

[100] Waring v. Somborn, 12 Hun, 81.

[101] Kager v. Brenneman, 52 App. Div. 446, 65 N. Y. Supp. 129.

Execution of a judgment for the recovery of money only, on an appeal to the appellate division, shall not be stayed, without security, for more than thirty days after the service on the attorney for the appellant of a copy of the judgment and written notice of the entry thereof.[102]

—— Form of order.

[Title of cause.] At a ——— term, etc.

On reading and filing the affidavit of ———, dated ———, with proof of due service thereof, and of notice of this motion, on ———, and on reading and filing [name any opposing papers]; and after hearing ———, attorney for ———, in support of said motion, and ———, attorney for ———, in opposition thereto; now on motion of ———, attorney for ———:

It is hereby ordered that the execution of the judgment of the ——— court, entered on the ——— day of ———, 190—, in the ——— county clerk's office [or "that the execution of the order of the ——— court, made at a ——— term thereof, held at ———, on the ——— day of ———, 190—,], be, and the same hereby is, stayed until the decision of the appeal taken therefrom to the ——— court by the said ———, on the said appellant filing with the clerk of the county of ——— an undertaking conditioned to [state terms of undertaking], and on [state other terms on which stay is granted.]

—— Form of undertaking given pursuant to order granting a stay.

[Title of cause.]

Whereas, on the ——— day of ———, 190—, a judgment of the ——— court, in the above action, in favor of ——— against ———, for ———, was entered in the office of the clerk of ——— county. [Or "an order was made and entered, by the ——— court, in the above action, requiring ———].

And the said ———, feeling aggrieved thereby, has appealed therefrom [or "intends to appeal therefrom"] to the ——— court;

And the ——— court having made an order, dated ———, that the execution of said judgment [or "order"] be stayed until the decision of the said appeal, on the execution of an undertaking, on the part of the said ———, with sureties, conditioned as provided in said order:

Now, therefore, we [continue as in preceding forms but closely follow the order as to the condition of the undertaking].

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[102] Code Civ. Proc. § 1351. Added by amendment by Laws 1903, c. 238.

—— **Retroactive effect.** Where the amount of a judgment is paid to the creditor who deposits it in a bank, after the affirmance of the judgment by the appellate division and pending an application to a judge of the court of appeals for leave to appeal to the court of appeals, an order cannot thereafter be made restraining the judgment creditor and his attorney from drawing out, and the bank from paying, an amount equal to the sum deposited.[103]

ART. II. GENERAL RULES AS TO THE UNDERTAKING.

§ 2671. Form and contents.

Having already considered the necessary statements in particular undertakings,[104] as fixed by the Code provisions, reference will now be made to the rules which apply generally as to the form and contents of undertakings on appeal.

The undertaking must be joint and several in form.[105] The obligee should be named,[106] and the residence of each surety should be stated,[107] together with his or her occupation. The order, if any, staying proceedings, should be distinctly referred to. A seal is not necessary and no consideration need be stated,[108] unless the undertaking is merely a common-law undertaking in which case a seal should be used which will import a consideration.

The only object of describing the judgment in the undertaking is to enable it to be identified as the subject of the instru-

[103] Klinker v. Third Ave. R. Co., 33 App. Div. 556, 53 N. Y. Supp. 1012.

[104] See ante, §§ 2658–2664.

[105] Vol. 1, p. 674. Underaking construed as creating joint and several liability, see Donovan v. Clark, 76 Hun, 339, 27 N. Y. Supp. 686. See Wood v. Fisk, 63 N. Y. 245, where undertaking construed as a joint obligation. "Joint" obligation, where accepted by obligee, is not "void." Denike v. Denike, 61 App. Div. 492, 70 N. Y. Supp. 629.

[106] See Titus v. Fairchild, 49 Super. Ct. (17 J. & S.) 211.

[107] Code Civ. Proc. § 1334.

[108] Gein v. Little, 43 Misc. 421, 89 N. Y. Supp. 488; Thompson v. Blanchard, 3 N. Y. (3 Comst.) 335; Post v. Doremus, 60 N. Y. 371.

ment.[109] The undertaking should recite the judgment appealed from so that it will appear whether the justification of the sureties is sufficient.[110] Failure to fully describe the judgment in the undertaking, where the intention to appeal from the entire judgment is clearly evidenced by the notice of appeal, as is the intention to secure a stay on the entire judgment, will not limit the liability to the part of the judgment described in the undertaking.[111] On appeal to the court of appeals, the undertaking must secure the original judgment or order and not the judgment or order appealed from.[112]

In certain cases, if the adverse party has died before the taking of the appeal, the undertaking must recite such fact.[113]

Stating that appellant "intends" to appeal does not render the undertaking invalid as showing that the undertaking was executed before the appeal was taken.[114]

—— **Affidavits of sureties.** The rules laid down in a preceding volume[115] apply.[116]

—— **Acknowledgment and certification.** The rules apply which are set forth in a preceding volume.[117]

—— **One or more instruments.** Where two or more undertakings are required to be given, they may be contained in the same instrument, or in different instruments, at the option of the appellant.[118] This authorizes an undertaking to perfect

[109] Undertaking describing judgment appealed from as entered on one day when in fact it was entered the following day, may be disregarded. Dinkel v. Wehle, 61 How. Pr. 159.

[110] Fay v. Lynch. 5 Monthly Law Bul. 57.

[111] So held where judgment for "costs of affirmance" was referred to instead of judgment for damages and costs. McElroy v. Mumford, 128 N. Y. 303.

[112] Briggs v. Brown, 13 Abb. N. C. 481; King v. Post, 12 State Rep. 575.

[113] See ante, § 2594.

[114] Forrest v. Havens, 38 N. Y. 469.

[115] Vol. 1, p. 676.

[116] Affidavit of sureties may be waived by respondent. Gibbons v. Berhard, 16 Super. Ct. (3 Bosw.) 635. Affidavit may, it seems, be permitted to be filed on motion to dismiss appeal. Id.

[117] Vol. 1, p. 679.

[118] Code Civ. Proc. § 1334.

the appeal and a separate undertaking to stay proceedings, on an appeal to the court of appeals, or instead one undertaking accomplishing both purposes.

It would seem that the chancery rule is still in force that where two or more have a common interest in resisting a reversal or modification of the judgment, a joint undertaking is sufficient, and that separate undertakings are necessary only where the respondents have entirely distinct and conflicting interests in relation to the disposal of the appeal.[119]

§ 2672. Insufficient undertakings.

If the undertaking is not in compliance with the Code provisions pursuant to which it is given, or the order granting a stay, it may, if respondent treats it as a stay, be enforced as a common-law undertaking.[120] But if respondent objects, he may require a proper undertaking or enforce his judgment or order as if no undertaking had been given. If the undertaking is insufficient but substantially complies with the Code or the order granting a stay, the respondent's remedy is to move to set it aside or give notice of the defect in it. He cannot disregard it unless the defect is substantial. For instance, if the undertaking refers to another judgment than the one entered, the respondent may disregard it and enforce his judgment;[121] but if the description of the judgment is merely defective he must move to set it aside or else not enforce his judgment pending the appeal.[122] An undertaking which does not comply with the Code as to the affidavit of the sureties is not effective as a stay.[123]

§ 2673. Amendment.

The Code rule as to amendment of undertakings in general[124] has already been considered. Section 1303 of the Code

[119] Thompson v. Ellsworth, 1 Barb. Ch. 624.
[120] See post, § 2683.
[121] Dinkel v. Wehle, 61 How. Pr. 159.
[122] Parfit v. Warner, 13 Abb. Pr. 471.
[123] Sternhaus v. Schmidt, 5 Abb. Pr. 66.
[124] Vol. 1, p. 686.

permits, inter alia, an amendment to be made where there is an omission, through mistake, inadvertence, or excusable neglect, to do any act necessary to stay the execution of the judgment or order appealed from. Under that section it is expressly provided that the application for an amendment must be on affidavit but that it may be made either to the court in, or to which, the appeal is taken.

It would seem that this power to amend authorizes the allowance of a new undertaking, in a proper case, where the first is defective.[125] The undertaking is amendable on the application of the sureties where the liability imposed on them is more than was intended.[126] On the other hand, if the condition of the undertaking is not sufficiently broad, it may be amended.[127] Where insufficient sureties are given, in good faith, the appellant may be relieved.[128] The motion to amend may be made at special term or in the appellate division.[129] The consent of the sureties to the proposed amendment should be obtained before the motion is made.[130] Relief should not be given where appellant has been guilty of gross and inexcusable laches.[131]

§ 2674. Filing.

The undertaking must be filed with the clerk with whom the judgment or order appealed from is entered.[132]

§ 2675. Service.

A copy of the undertaking, where it is given pursuant to either of the Code sections from 1327 to 1334,[133] with a notice

[125] Wood v. Kelly, 2 Hilt. 334.
[126] O'Sullivan v. Connors, 22 Hun, 137.
[127] Wilson v. Allen, 3 How. Pr. 369.
[128] Wheeler v. Millar, 61 How. Pr. 396.
[129] O'Sullivan v. Connors, 22 Hun, 137.
[130] Ramsey v. Childs, 34 Hun, 329; Biggert v. Nichols, 18 Misc. 596, 42 N. Y. Supp. 472.
[131] Parker v. McCunn, 9 Wkly. Dig. 245.
[132] Code Civ. Proc. § 1307.
[133] Code Civ. Proc. § 1334. If served after such time, it is ineffectual. Wick v. Ft. Plain & R. S. R. Co., 21 Misc. 718, 49 N. Y. Supp. 334.

showing where it is filed, must be served on the attorney for the adverse party with the notice of appeal or before the expiration of the time of appeal. However, a failure to serve a copy of the undertaking may be waived, it would seem, by the service of a notice that respondent excepts to the sureties.

—— Form of notice of filing undertaking.

[Title of cause.]

Please take notice that an undertaking, of which the within is a copy, was duly filed on the ——— day of ———, 190—, in the office of the clerk of ——— county.

[Date.] [Signature of appellant's attorney.]

[Address.]

ART. III. SURETIES.

§ 2676. Who may be, and number.

The undertaking must be executed by at least two sureties.[134] Appellant himself cannot be one of the two sureties.[135] The rules laid down in a preceding volume as to who may be sureties on undertakings in general [136] apply to undertakings on appeal.

§ 2677. Exception and justification.

"It is not necessary that the undertaking should be approved; but attorney for the respondent may, within ten days after the service of a copy of the undertaking with notice of the filing thereof, serve upon the attorney for the appellant a written notice that he excepts to the sufficiency of the sureties. Within ten days thereafter, the sureties, or other sureties in a new undertaking to the same effect, must justify

[134] Code Civ. Proc. § 1334. That a fidelity or surety company may take the place of two sureties, see vol. 1, pp. 672, 675. Who must execute undertakings in general, see vol. 1, p. 672. Appellant may be punished for contempt where he puts in fictitious bail. Hall v. Lanza, 97 App. Div. 490, 89 N. Y. Supp. 980.

[135] Nichols v. MacLean, 98 N. Y. 458.

[136] Volume 1, p. 673.

before the court below, or a judge thereof, or a referee appointed by the same, or a county judge. At least five days notice of the justification must be given. A referee may be appointed upon the motion of either party, or upon the court's own motion to take the justification of such sureties and to report the evidence upon the same to the court or judge with his opinion. The court may further direct that either party shall pay the expenses of such reference. If the court or judge finds the sureties sufficient he must indorse his allowance of them upon the undertaking, or a copy thereof, and a notice of the allowance must be served upon the attorney for the exceptant. The effect of a failure so to justify and procure an allowance is the same as if the undertaking had not been given. The court shall also have power, in case it shall be made to appear to its satisfaction, upon motion, that the exception was taken unnecessarily or for purposes of vexation or delay, to set the same aside and approve the undertaking."[127]

It will be noticed that the first step which respondent may take is to give notice of exception to the sureties, within the prescribed ten days. Then appellant has ten days in which to procure a justification of the sureties or of new sureties, and notice of justification must be served at least five days before the day set for justification, i. e., within five days after the service of the notice of exception. The appellant need not, however, procure a justification if there is sufficient time to give a new undertaking, i. e., if the time to perfect an appeal

[127] Code Civ. Proc. § 1335. This Code provision applies to appeals to the supreme court from an inferior court (Code Civ. Proc. § 1341) and to appeals to the appellate division from a judgment of the supreme court (Id. § 1351). Exception should be taken to the sureties and not to the undertaking. Young v. Colby, 2 Code R. 68. Justification of fidelity or surety company, see vol. 1, p. 680. Justification of sureties for more than double the amount is not objectionable. Hill v. Burke, 62 N. Y. 111. Ten days in which to serve notice of exception does not begin to run until undertaking is filed and notice thereon given. Mere service of copy of undertaking does not start the time running. Webster v. Stevens, 12 Super. Ct. (5 Duer) 682. Sureties cannot escape liability because of an informality in the justification. Hill. v. Burke, 62 N. Y. 111.

has not expired, but instead may give a new undertaking, file it, and serve a copy with notice of filing, in which case there must be a new exception to the sureties if respondent wishes to compel the sureties to justify.[138] If appellant desires to have sureties justify he may either give notice that the old sureties will justify or that other sureties in a new undertaking to the same effect will justify. If the sureties are found sufficient the judge indorses his allowance on the undertaking or on a copy. Then the appellants' attorney must serve notice of allowance on the attorney for the party excepting.

Failure to have the sureties justify, within ten days after service of the notice that the respondent excepts to their sufficiency, places the appellant in the same position as if the undertaking had not been given;[139] except that if the exceptions are withdrawn,[140] or if the undertaking is permitted to operate as a stay, the sureties are liable though they do not justify.[141] In other cases, if the sureties do not justify they are released from liability.[142]

The execution of the judgment, and all proceedings thereunder, are stayed for ten days after the service of a notice that the respondent excepts to the sufficiency of the sureties, unless the undertaking is disallowed by the court within said ten days.[143]

An allowance of the undertaking by default after the expiration of the ten days is a nullity.[144] It has been held that if

[138] Blake v. Lyon & F. Mfg. Co., 75 N. Y. 611.

[139] Lewin v. Towbin, 51 App. Div. 477, 64 N. Y. Supp. 740; Chamberlain v. Dempsey, 13 Abb. Pr. 421.

[140] But withdrawal of exceptions or a waiver of justification, served after the action was revived on the death of appellant, does not prevent the discharge of the sureties who had not justified within the statutory time. Ginsburg v. Kuntz, 60 Hun, 504, 15 N. Y. Supp. 237.

[141] Goodwin v. Bunzl, 102 N. Y. 224.

[142] Manning v. Gould, 90 N. Y. 476, 480, which thoroughly considers the effect of this Code provision.

[143] Laux v. Gildersleeve, 22 App. Div. 98, 101, 47 N. Y. Supp. 770.

[144] Lewin v. Towbin, 51 App. Div. 477, 480, 64 N. Y. Supp. 740. See, also, Hees v. Snell, 8 How. Pr. 185.

the respondent, or some one in his behalf, does not attend at the time set for the justification of the sureties, he waives the benefit of his exceptions,[145] but it is doubtful whether such rule applies as the Code provision now stands.

One who examines a proposed surety should put down "all" the answers, whether or not satisfactory.[146]

The court has power to allow an undertaking to be filed nunc pro tunc when justification has been inadvertently omitted, after exception to the sureties, though a new undertaking might have been filed.[147]

—— Form of notice of exception to sureties.

[Title of cause.]

Please take notice that the respondent excepts to the sufficiency of all the sureties who executed the undertaking filed by the appellant in the office of the clerk of the county of ——— on the ——— day of ———, 190—, and a copy of which was served on me on the ——— day of ———, 190—, on appeal to the ——— court, from the judgment (or "order") entered in the above-entitled action.

[Date.] [Signature and office address of respondent's attorney.]
[Address.]

—— Form of notice of justification.

[Title of cause.]

Please take notice that ——— and ———, the sureties who executed the undertaking given by the appellant on his appeal to the ——— court from the judgment (or "order") entered in the above-entitled action, which was filed in the office of the county clerk of ——— county, on the ——— day of ———, 190—, and a copy of which was served on you on the ——— day of ———, 190—, will justify before Hon. ———, justice of the ——— court, at his office in the city of ———, on the ——— day of ———, 190—, at —— in the ——— noon.

[Date.] [Signature, etc., of appellant's attorney.]
[Address.]

—— Notice of justification of sureties in a new undertaking.

[Title of cause.]

Please take notice that ———, [a butcher], residing at No. ———

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[145] So held under old Code provision where justification was required as of bail on an order of arrest. Ballard v. Ballard, 18 N. Y. 491.

[146] Schmidt v. Livingston, 19 Misc. 353, 43 N. Y. Supp. 494.

[147] Hardt v. Schulting, 59 How. Pr. 353.

street in the city of ———, and ———, [a farmer], residing at ———, the sureties in a new undertaking executed by the appellant in place of, and to the same effect as, the undertaking filed in the office of the county clerk of ——— county, on the ——— day of ———, 190—, a copy of which was served on you on the ——— day of ———, 190—, will justify before Hon. ———, justice of the ——— court, at ———, on the ——— day of ———, 190—, at —— o'clock in the ——— noon.

[Date.] [Signature, etc., of appellant's attorney.]
[Address.]

——— Form of allowance of sureties.

I find the sureties in the within undertaking sufficient, and hereby allow them, and each of them.

[Date.] [Signature and official title of judge.]

——— Form of notice of allowance of sureties.

[Title of cause.]

Please take notice that, on the ——— day of ———, 190—, the sureties in the undertaking given by the appellant on appeal to the ——— court from the judgment (or "order") entered in the above-entitled action, justified before Hon. ———, justice of the ——— court, and were found sufficient by said justice who allowed them, and each of them.

[Date.] [Signature, etc., of appellant's attorney.]
[Address.]

§ 2678. New undertaking where sureties become insolvent.

The court in which the appeal is pending, upon satisfactory proof, by affidavit, that since the execution of an undertaking one or more of the sureties therein have become insolvent, or that his or their circumstances have become so precarious that there is reason to apprehend that the undertaking is not sufficient for the security of the respondent, may make an order, requiring the appellant to file a new undertaking and to serve a copy thereof, as required with respect to the original undertaking.[148]

[148] Code Civ. Proc. § 1308. This provision does not apply to an appeal to a county court from a justice's judgment. Bonnett v. Townsend, 63 Hun, 45, 17 N. Y. Supp. 566. The court cannot require new sureties nor stay proceedings because the guardian ad litem fails to pay the costs of a judgment. Wice v. Commercial Fire Ins. Co., 2 Abb. N. C. 325, 7 Daly, 258.

This power to order a new undertaking is purely statutory.[149] The Code provision is not mandatory, since the making of the order rests in the discretion of the court.[150]

—— Form of order for new undertaking.

[Title of cause.] At a ——— term, etc.

On reading and filing the affidavit of ———, dated the ——— day of ———, 190—, and on proof of service of notice of this motion on ———, attorney for ———, the appellant herein, and on reading [name any opposing papers]; now, on motion of ———, attorney for ———,

It is hereby ordered that the appellant file a new undertaking, and that he serve a copy thereof as required with respect to the original undertaking, within [twenty] days after the service of a copy of this order on his attorney; and, in case of failure so to do, that his said appeal be dismissed [or "that the judgment (or 'order') appealed from be executed as if the original undertaking had not been given"].

—— **Court in which motion must be made.** The motion must be made in the court in which the appeal is pending. The court from which the appeal is taken has no jurisdiction to make the order.[151]

—— **Contents of new undertaking.** Where a surety on the undertaking has become insolvent, after an appeal to the court of appeals, the appellant will not be allowed to file a new undertaking simply for costs where the original was for costs and to stay proceedings.[152]

—— **Order as releasing sureties from liability.** An order requiring a new undertaking does not, of itself, release the sureties from liability. If the respondent takes no further steps after obtaining the order, to enforce the judgment or dismiss the appeal, the sureties remain liable until a new undertaking

[149] Bonnett v. Townsend, 63 Hun, 45, 17 N. Y. Supp. 566; Willett v. Stringer, 15 How. Pr. 310. That surety swears falsely as to his sufficiency does not warrant the requiring a new undertaking, see Elson v. Murray, 27 Hun, 536.

[150] If security is sufficient, insolvency of one surety does not require that the court grant the order. Dering v. Metcale, 72 N. Y. 613.

[151] Parks v. Murray, 109 N. Y. 646.

[152] Beeman v. Banta, 113 N. Y. 615.

is executed.[153] But if the original undertaking was merely to stay proceedings, the issuing of execution on the judgment on failure of the appellant to give a new undertaking, waives the right to proceed against the sureties.[154] If the original undertaking was given both to perfect an appeal to the court of appeals and to stay proceedings, and the appeal is dismissed on failure to give a new undertaking, the sureties are liable on the undertaking only in so far as it provides for the payment of damages and costs, i. e., in so far as it was given to perfect the appeal.[155]

—— **Effect of failure to comply with order.** If the appellant fails to file a new undertaking and serve a copy thereof, within twenty days after the service of a copy of the order, or such further time as the court allows, the appeal must be dismissed, or the order or judgment, from which the appeal is taken, must be executed, as if the original undertaking had not been given.[156] If the original undertaking was given merely to perfect the appeal, the failure to obey the order requires a dismissal of the appeal. If it was given merely to stay proceedings, the appeal cannot be dismissed, but the stay is terminated.[157]

ART. IV. LIABILITY ON, AND ENFORCEMENT OF, UNDERTAKING.

§ 2679. Liability in general.

The liability of sureties is restricted to the strict terms of their contract, and cannot be extended by inference or implication, except where the instrument shows a clear intention to come under a more enlarged obligation.[158]

153, 154 Collins v. Ball, 31 Hun, 187.

155 Liability limited to $500. Galinger v. Engelhardt, 26 Misc. 49, 55 N. Y. Supp. 334.

156 Code Civ. Proc. § 1308.

157 Genter v. Fields, 2 Abb. Dec. 253; Jewett v. Crane, 35 Barb. 208.

158 McElroy v. Mumford, 128 N. Y. 303, 307.

§ 2680. What constitutes an affirmance so as to make sureties liable.

A pro forma affirmance, based exclusively on the stipulation of the parties and without any hearing or adjudication by the appellate court on the merits, is not an affirmance within the meaning of the word as used in the undertaking.[159] If two or more appeal together, and the undertaking provides that the sureties will pay if the judgment "or any part thereof, be affirmed," the sureties are liable if the judgment is affirmed against one appellant though reversed as to the other.[160]

§ 2681. What constitutes a reversal so as to discharge sureties.

Liability on an undertaking, on an appeal to the court of appeals, to pay any costs or damages which may be awarded against the appellant on the appeal, together with the judgment, if affirmed, is terminated by a reversal of the judgment though with "costs to abide the event."[161] But liability on an undertaking given on an appeal to the appellate division is not terminated by a reversal by the appellate division, but continues, and is enforcible, in case the court of appeals reverses the appellate division and affirms the original judgment;[162] although the liability does not extend to the costs on the appeal to the court of appeals.[163]

§ 2682. Liability as between sureties on different undertakings.

Where there are two undertakings on appeal, one to the appellate division and one to the court of appeals, and both con-

[159] Foo Long v. American Surety Co., 146 N. Y. 251, reversing, on this point 61 Hun, 595, 16 N. Y. Supp. 424.

[160] Seacord v. Morgan, 4 Abb. Dec. 172.

[161] Jackson v. Lawyers' Surety Co., 95 App. Div. 368, 88 N. Y. Supp. 576.

[162] Robinson v. Plimpton, 25 N. Y. 484, followed in Foo Long v. American Surety Co., 146 N. Y. 251, 253; Chester v. Broderick, 60 Hun, 562, 15 N. Y. Supp. 353; MacKellar v. Farrell, 29 State Rep. 350, 8 N. Y. Supp. 307.

[163] Hinckley v. Kreitz, 58 N. Y. 583.

tain an agreement to pay the judgment, if affirmed, the primary liability, in the event of an affirmance, rests on the sureties on the court of appeals undertaking, so that their release by the judgment creditor, without payment in full, discharges the sureties on the appellate division undertaking.[164]

§ 2683. Liability on common-law undertaking.

The fact that an undertaking is framed under the wrong Code provision, or is not in exact compliance with the order granting a stay and prescribing the security to be given, does not prevent it from becoming enforcible as a common-law agreement. Such an undertaking is to be treated simply as an agreement between the parties, and the usual and ordinary legal signification is to be given to the words used.[165] An undertaking insufficient as a statutory undertaking, may, where founded on a good consideration, and not illegal, and not objected to, be treated as a common-law undertaking, but in such case it can only be enforced according to its terms and it will not be given the force and effect of a statutory undertaking unless its provisions require it.[166] There must be a consideration, though it need not be stated in the undertaking,[167] to make the undertaking binding as a common-law obligation. An undertaking, though properly executed and filed, which for any valid reason is disregarded or fails to secure the stay of pro-

[164] Hinckley v. Kreitz, 58 N. Y. 583. But where the liability of the sureties on the court of appeals undertaking is first exhausted, the sureties on the other undertaking are not discharged where a balance remains due. Chester v. Broderick, 131 N. Y. 549.

[165] Concordia Sav. & Aid Ass'n v. Read, 124 N. Y. 189; Henmon v Kipp, 30 App. Div. 288, 51 N. Y. Supp. 960.

[166] Concordia Sav. & Aid Ass'n v. Read, 124 N. Y. 189; Goodwin v. Bunzl, 102 N. Y. 224.

[167] The statute of frauds does not make it necessary that an undertaking shall state the consideration for the sureties' obligation in order to entitle the obligee to maintain an action. Gein v. Little, 43 Misc. 421, 89 N. Y. Supp. 488. A sealed undertaking on appeal, which was ineffectual as a statutory undertaking, was not void as to the sureties under the statute of frauds on the ground that the consideration was not expressed therein. Id.

ceedings, is virtually without consideration and cannot be enforced against the sureties.[168] But where, in an action on the undertaking, the instrument was sealed, and the sureties made no attempt to rebut the presumption of a consideration arising from such fact, and it was shown by plaintiff that the undertaking was given to stay proceedings, and that, though not sufficient for such purpose, it was so treated, a consideration was shown rendering the sureties liable upon the undertaking as upon a common-law obligation.[169] On the other hand, an undertaking which is a voluntary agreement, ineffectual to accomplish the purpose for which it was executed, and not securing to the respondent the benefit intended inasmuch as he treats it as void, is not enforcible.[170] For instance, if the obligee elects to treat the undertaking for a stay as invalid, and proceeds to collect his judgment in disregard thereof, he cannot afterwards sue thereon.[171] An undertaking given to stay proceedings, in a case where a stay can be obtained only by order, cannot be enforced as a common-law undertaking where no order granting a stay has been made, and where there is nothing to show that the respondent agreed to, or actually did, refrain from enforcing his order.[172]

§ 2684. Discharge of sureties by extrinsic events.

In preceding sections, the discharge of a surety where he fails or refuses to justify,[173] or where a new undertaking is ordered on a change in the pecuniary circumstances of one or both of the sureties,[174] has been considered. General rules as

[168] Wing v. Rogers, 138 N. Y. 361, 366.

[169] Where the undertaking, when produced in evidence, is sealed, the burden is on the sureties defending on the ground of want of consideration to rebut the presumption of consideration arising from the use of the seal. Gein v. Little, 43 Misc. 421, 89 N. Y. Supp. 488.

[170] Carter v. Hodge, 150 N. Y. 532.

[171] Hemmingway v. Poucher, 98 N. Y. 281.

[172] Mossein v. Empire State Surety Co., 97 App. Div. 230, 89 N. Y. Supp. 843.

[173] See ante, § 2677.

[174] See ante, § 2678.

to what will release sureties from liability on undertakings in general are set forth in volume one of this work.[175]

—— **Change of parties pending the appeal.** A change of parties pending the appeal does not change the liability of the sureties.[176] A recovery against a person substituted, or against a survivor, is a recovery against the appellant.[177]

—— **Extension of time.** An agreement between the parties, on stipulating for an affirmance of the judgment, that no execution issue within a specified number of months, releases the sureties.[178]

—— **Change in the statutes.** A change in the law in respect to the damages which may be awarded on the appeal does not release the sureties.[179]

—— **Discharge in bankruptcy.** The discharge of the judgment debtor as a bankrupt, pending an appeal from the judgment, does not release the sureties.[180]

§ 2685. Remedy by action.

The remedy on the undertaking is by action.[181]

§ 2686. Exhausting remedy by enforcing judgment as condition precedent.

The judgment creditor is not bound to exhaust his remedy on the judgment before enforcing the undertaking.[182]

§ 2687. Notice of entry of judgment or order as condition precedent.

An action shall not be maintained upon an undertaking given upon an appeal taken to the appellate division or to the

175, 176 Volume 1, p. 683.

177 Potter v. Van Vranken, 36 N. Y. 619, 630.

178 Ross v. Ferris, 18 Hun, 210.

179 Horner v. Lyman, 4 Keyes, 237.

180 Knapp v. Anderson, 71 N. Y. 466.

181 Reference to ascertain damages cannot be ordered. Cambreling v. Purton, 40 State Rep. 771, 16 N. Y. Supp. 49.

182 Wood v. Derrickson, 1 Hilt. 410; Heebner v. Townsend, 8 Abb. Pr. 234.

supreme court, "until ten days have expired since the service upon the attorney for the appellant, and upon the sureties on such undertaking, of a written notice of the entry of a judgment or order, affirming the judgment or order appealed from, or dismissing the appeal. Such service may be made by mailing such notice in a postpaid wrapper, addressed to said surety or sureties at the last known postoffice address of such surety or sureties."[183]

This Code provision does not apply to actions on undertakings given on an appeal to the court of appeals.[184] Formerly, the rule did not apply where the appeal was simply dismissed and the judgment not affirmed,[185] but now it applies to a judgment of dismissal as well as one of affirmance. It does not apply to appeals taken from orders or decrees made by a surrogate.[186]

—— **Sufficiency of notice.** The strict requirements as to the service of a notice to limit the time to take an appeal do not apply to a service made under this Code section.[187] When the order served bore a certificate of the clerk that it had been filed and entered and was also indorsed by the attorney, the notice is sufficient though there was no specific notice signed by the attorney that the order had been entered.[188] The notice need not specifically state that the judgment of affirmance has been entered,[189] although service of a copy of the order affirming the judgment is insufficient where there is nothing to show

[183] Code Civ. Proc. § 1309. Prior to 1894, the Code did not require service of notice on the sureties on the undertaking nor allow service by mail. The object of this Code provision is to give the sureties notice of the amount for which they are liable, with ample time to enable them to pay, without the expense of an action on the undertaking. Loweree v. Tallman 30 App. Div. 225, 52 N. Y. Supp. 431.

[184] Staples v. Gokey, 34 Hun, 289. Sterne v. Talbott, 89 Hun, 368, 35 N. Y. Supp. 412; Weil v. Kempf, 12 Civ. Proc. R. (Browne) 379; Galinger v. Engelhardt, 26 Misc. 49, 55 N. Y. Supp. 334.

[185] Wheeler v. McCabe, 5 Daly, 387.

[186] Hildreth v. Lerche, 23 Abb. N. C. 428, 10 N. Y. Supp. 238.

[187, 188] Milligan v. Cottle, 92 Hun, 323, 36 N. Y. Supp. 904.

[189] Rogers v. Schmersahl, 4 Hun, 623.

that the order had been entered.[190] When an appeal is dismissed with costs by order of the appellate division, a copy of such order itself should not be served on the parties. A copy of the judgment, entered on the order, should be served.[191]

—— Form of notice.

[Title of cause.]

Please take notice that on the ——— day of ———, 190—, a judgment [or "order"], in the above action, was entered in the office of the county clerk of ——— county, pursuant to a decision rendered by the appellate division of the supreme court, ——— department, affirming [or "dismissing the appeal from"] the judgment [or "order"] of the ——— court for [state relief granted by judgment or order of the lower court], and awarding ——— dollars costs of the appeal to ———.

[Date.] [Signature and office address of respondent's attorney.]
[Address.]

—— Who must be served. Under the old Code the notice was required to be served on the "adverse party." Now it must be served on the attorney for the appellant and on the sureties on the undertaking. If, however, the attorney for the appellant is dead, and no attorney has been appointed in his place, there is a sufficient excuse for failure to serve notice other than on the sureties.[192]

—— Second notice. A reduction of the costs on retaxation after entry of the judgment and service of a notice thereof does not necessitate the service of a new notice.[193]

—— Waiver of failure to serve, or defects in, notice. Failure to serve the notice is not waived by applying for leave to appeal to the court of appeals.[194] But an irregularity in the

[190] Rae v. Beach, 76 N. Y. 164.

[191] Loweree v. Tallman, 30 App. Div. 225, 52 N. Y. Supp. 431.

[192] Chilson v. Howe, 17 Civ. Proc. R. (Browne) 86, 5 N. Y. Supp. 780. It is immaterial that the attorney was alive for several months after the entry of the judgment appealed from. Id. Notice, after the death of the attorney, to appoint another attorney, which respondent fails to do, and then a service on the respondent, is, at any event, sufficient. Id.

[193] Yates v. Burch, 87 N. Y. 409.

[194] Rae v. Harteau, 7 Daly, 95.

notice is waived by the acceptance and retention of the notice.[195]

§ 2688. Right to sue as precluded by appeal to court of appeals.

Where an appeal to the court of appeals, from a judgment or order, is perfected after service of the judgment or order of the supreme court or appellate division, on the attorney for appellant and on the sureties, as a condition precedent to suing on the undertaking, and security is given thereupon, to stay proceedings, an action cannot be maintained on the undertaking given on the preceding appeal, until after the final determination of the appeal to the court of appeals.[196]

§ 2689. Complaint.

The complaint must allege service of the notice of the order or judgment of affirmance or dismissal, where the undertaking was given on an appeal to the supreme court or the appellate division.[197] It is not demurrable because it omits to aver that the undertaking was accompanied by the affidavit of the sureties that they were worth double the sum specified therein.[198]

—— Form of complaint.

[Title of court and venue.]
[Title of cause.]

The plaintiff above named, complaining of defendant, alleges:

I. That on the ——— day of ———, judgment was rendered [or "an order was made"] in the ——— court in favor of the above-named plaintiff against ——— for the sum of ——— dollars [or otherwise state the nature of the judgment or order].

II. That on the ——— day of ——— the said ——— appealed to the ——— court, from the said judgment [or "order"].

III. That on or about the ——— day of ———, 190—, defendant made, and caused to be filed with the county clerk of ——— county,

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[195] Failure to add office address of attorney to notice. Evans v. Backer, 101 N. Y. 289.

[196] Code Civ. Proc. § 1309.

[197] Porter v. Kingsbury, 71 N. Y. 588.

[198] Gibbons v. Berhard, 16 Super. Ct. (3 Bosw.) 635.

an undertaking, a copy of which is hereto annexed, marked "A" and made a part of this complaint. [At pleader's option, substance of undertaking may be set forth.]

IV. That by an order of the ——— court, made on or about the ——— day of ———, 190—, the judgment [or "order"] appealed from was in all respects affirmed [or state other disposition of case], and the sum of ——— dollars, costs and damages on the appeal, was awarded against the appellant, but that no part of the same has been paid.

V. [If undertaking was given on appeal to appellate division or appellate term add:] That more than ten days before the commencement of this action plaintiff served on the attorney for said ———, and on ——— and ———, the sureties on the said undertaking, written notice of the entry of said order affirming [or "dismissing the appeal from"] said judgment [or "order"].

Wherefore, this plaintiff demands, etc.

§ 2690. Defenses.

The general rules as to what defenses may be set up by sureties on undertakings in general, as set forth in a preceding volume,[199] apply. Technical defects and informalities in the undertaking cannot be set up as a defense. For instance, erroneous recitals in the undertaking as to the amount, and the date of entry, of the judgment, cannot be set up as a defense.[200] It is not a defense that the statute of limitations has run against a co-surety, where it has not run against defendant.[201] Nor is it a defense to an action on an undertaking given by executors that they have not sufficient assets to pay the judgment.[202]

ART. V. EFFECT OF STAY.

§ 2691. General rules.

Where an appeal to the general term of any court, or to the appellate division, or to the court of appeals, or otherwise, has

199 Vol. 1, p. 689.

200 Levi v. Dorn, 28 How. Pr. 217.

201 Staples v. Gokey, 34 Hun, 289.

202 Remedy was, before decision of appeal, to apply to dispense with or limit the security. Yates v. Burch, 87 N. Y. 409.

been perfected,[203] and the other acts, if any,[204] required to be done, to stay the execution of the judgment or order appealed from, have been done, the appeal stays all proceedings to enforce the judgment or order appealed from, except that the court or judge, from whose determination the appeal is taken, may proceed in any matter included in the action or special proceeding, and not affected by the judgment or order appealed from or not embraced within the appeal; or may cause perishable property to be sold, pursuant to the judgment or order appealed from. The proceeds of such a sale must be paid, to abide the result of the appeal, into the court from or in which the appeal is taken; or, if it was taken from a final determination of a special proceeding, into the supreme court.[205]

The object of this Code provision is to protect the party appealing from having the judgment enforced against him while the controversy is pending.[206]

The stay applies only to the ordinary proceedings in the action.[207] The proceedings stayed are only those which may be instituted by the respondent for the purpose of enforcing the provisions of the judgment.[208] By the express terms of this Code section, a perfected appeal, with certain exceptions, where security to stay proceedings has been given, "stays all proceedings to enforce the judgment or order appealed from." It has been held that a motion for alimony pendente lite, to defend the appeal, is not a "proceeding to enforce the judgment or order,"[209] nor is the filing and docketing with the county clerk of a transcript of the docket of a judgment, where

[203] An appeal is "perfected," within this Code provision, when the notice of appeal has been served on the respondent and filed with the clerk, except that in the court of appeals, in addition, an undertaking to pay costs must be filed.

[204] Phrase "if any" construed. Taft v. Marsily, 14 Civ. Proc. R. (Browne) 415.

[205] Code Civ. Proc. § 1310.

[206] Morey v. Tracey, 92 N. Y. 581.

[207] Seeman v. Reiche, N. Y. Daily Reg., June 23, 1882.

[208] Ireland v. Nichols, 9 Abb. Pr. (N. S.) 71, 40 How. Pr. 85.

[209] Di Lorenzo v. Di Lorenzo, 78 App. Div. 577, 79 N. Y. Supp. 566.

such transcript was procured prior to the stay becoming effective.[210] So the appointment of a receiver in place of one appointed before judgment but who declined to act is not a violation of the stay.[211] So the stay does not prevent the discharging of a receiver appointed pendente lite as a provisional remedy.[212] And the stay does not prevent the bringing of a new action against joint debtors not served in the action in which the judgment appealed from was obtained.[213] Likewise, an application to compel delivery of books belonging to a public office is not a proceeding in the court below, so as to violate the stay on an appeal from a judgment of ouster in an action to try the title to such office.[214] But a stay on appeal from a judgment against a sheriff for an escape precludes the granting of leave to sue on the official bond of the sheriff.[215] So a stay precludes a creditor's suit based on the judgment appealed from.[216]

The stay, however, cannot undo what has lawfully been done under the judgment or order appealed from.[217] The effect of the security is merely to stay proceedings as of the time when the security is given.[218]

Pending proceedings are not vacated or discharged but are merely suspended. For instance, a stay does not discharge a previous levy of an execution.[219] So, while the stay "suspends" supplementary proceedings based on the judgment or order appealed from,[220] it does not vacate them.

210 Bulkeley v. Keteltas, 5 Super. Ct. (3 Sandf.) 740.
211 MacKellar v. Farrell, 29 State Rep. 350.
212 Ireland v. Nichols, 9 Abb. Pr. (N. S.) 71, 40 How. Pr. 85.
213 Morey v. Tracey, 92 N. Y. 581.
214 Matter of Welch, 7 How. Pr. 282.
215 Matter of Chamberlain, 28 How. Pr. 1.
216 See Smith v. Crocheron, 2 Edw. Ch. 501, which so held as to writ of error.
217 Drake v. Rogers, 3 Hill, 604.
218 Rathbone v. Morris, 9 Abb. Pr. 213.
219 Matter of Berry, 26 Barb. 55; Rathbone, v. Morris, 9 Abb. Pr. 213.
220 Cowdrey v. Carpenter, 25 Super. Ct. (2 Rob.) 601, 17 Abb. Pr. 107.

§ 2692. On appeal from judgment for rent.

When an appeal from a judgment for rent has been perfected and execution stayed, the appeal stays all summary proceedings, pending or otherwise, to recover the possession of real property or dispossess tenants therefrom, based on the failure to pay the rent included in the judgment appealed from.[221]

§ 2693. On appeal from judgment awarding injunction.

Where the appellant is a party who is enjoined by the judgment from doing specified acts, the effect of a stay of proceedings is merely to prevent the collection of the costs awarded. The injunction continues in force just as if no security to stay proceedings had been given, and it follows that the appellant may be punished by contempt proceedings if he violates the injunction pending the appeal.[222] The appellant's remedy is to apply to a court or a judge to stay the injunction pending the appeal.[223] The granting of such application is discretionary and depends on the particular facts in each case.

§ 2694. On appeal to court of appeals.

After an appeal to the supreme court from an inferior court, where the execution of the judgment or order of the appellate court is stayed by an appeal to the court of appeals, the proceedings in the court below or before the judge or justice, who made the order, are stayed in like manner.[224]

§ 2695. Power to discharge levy on personal property.

The Code section authorizing the court to discharge a levy on personal property under an execution, where security to stay proceedings has been given, has been considered in a preceding volume.[225]

221 Code Civ. Proc. § 1310.
222 Sixth Ave. R. Co. v. Gilbert El. R. Co., 71 N. Y. 430.
223 See post, § 2701.
224 Code Civ. Proc. § 1345.
225 Volume 3, § 2175.

§ 2696. Power to suspend lien of judgment appealed from.

After appeal perfected and the giving of security to stay proceedings, the court may order that the lien of the judgment on real property and chattels real be suspended pending the appeal. This matter has been fully treated of in the chapter on Judgments, in a preceding volume.[226]

§ 2697. Duration of stay.

The stay is terminated when the order on the decision of the appeal is entered of record.[227]

[226] Volume 3, pp. 2803–2807.

[227] Petrie v. Fitzgerald, 2 Abb. Pr. (N. S.) 354. Order entered on the minutes does not terminate stay. Mallory v. East River Ins. Co., 7 Hill, 192; Ackroyd v. Ackroyd, 3 Daly, 38.

CHAPTER IX.

EFFECT OF APPEAL.

Scope of chapter, § 2698.
Time when jurisdiction of appellate tribunal attaches, § 2699.
Extent of jurisdiction acquired by appellate court, § 2700.
—— Appeal from part of judgment or order.
—— Appeal from interlocutory order.
Proceedings in lower court after taking of appeal, § 2701.
—— Opening judgment or order.
—— Amendment of judgment or order.
—— Actions relating to judgment appealed from.
—— Renewal of motion.
—— Motion for new trial.
—— Appointment of receiver.
—— Injunction.
—— Proceeding with trial after appeal from interlocutory determinations.
—— Matters relating to record.
Effect on judgment or order appealed from, § 2702.
—— Judgment as estoppel.
—— Lien of judgment.
—— Judgment as subject of set-off.
Appeal as enlarging time, § 2703.
Waiver by taking of appeal, § 2704.

§ 2698. Scope of chapter.

It is the purpose of this chapter to review the questions as to the respective powers of the appellate court and the court from which the appeal is taken, after an appeal is perfected. Questions as to what court may grant a stay of proceedings, the necessity therefor, and the effect thereof, will not be considered, but reference should be made to a preceding chapter.[1] Furthermore, the Code provisions, already noticed, that particular applications shall be made to the appellate court or to the lower court, or either, will not be reiterated.

[1] See ante, c. 9.

§ 2699. Time when jurisdiction of appellate tribunal attaches.

Jurisdiction of the cause is not transferred to the appellate tribunal until the appeal is perfected, i. e., notice of appeal is served and an undertaking, if necessary, given.[2]

§ 2700. Extent of jurisdiction acquired by appellate court.

In all matters pertaining to the appeal itself, and to the proper hearing thereof, the appellate court has jurisdiction, and also in regard to all applications which by statute may be made to the appellate court after taking an appeal, but as to all other applications the case is regarded as still pending in the lower court, and such applications should be made to that court.[3] For instance, a special term cannot strike a case from the calendar of the appellate division,[4] nor can it make an order declaring an appeal abandoned,[5] or dismiss an appeal.[6] But the lower court is not deprived of jurisdiction over incidental matters necessary to preserve the fruits of the ultimate judgment or the status in quo of the parties. For instance, it has been held in other states that the court may make an order providing for renting or leasing the property, or order investment of funds resulting from the sale of property under an order made pending litigation.[7]

A motion to compel appellant's attorneys to pay costs, personally, on the dismissal of the appeal, cannot be made in the appellate court but must be made in the court below after the judgment has been there entered.[8]

——**Appeal from part of judgment or order.** Where only part of a judgment or order is appealed from, the remainder

[2] Adams v. Fox, 27 N. Y. 640. It is not necessary that the return be first filed. Id.

[3] People ex rel. Hoffman v. Board of Education, 141 N. Y. 86.

[4] Ziadi v. Interurban St. R. Co., 97 App. Div. 137, 89 N. Y. Supp. 606.

[5] True v. Sibley, 61 State Rep. 200, 29 N. Y. Supp. 704.

[6] See post, p. 3847.

[7] 2 Cyc. 978.

[8] Struffman v. Muller, 74 N. Y. 594 (mem).

is unaffected and the appellate court has no jurisdiction over it.[9]

—— **Appeal from interlocutory order.** An appeal from an incidental order does not give the appellate court any power over the final judgment which has been entered pending the appeal. For instance, an appeal from an order denying a motion to change the place of trial, does not give the appellate court power to vacate, on an original application, a judgment afterwards entered in the action.[10]

§ 2701. Proceedings in lower court after taking of appeal.

As already stated, an appeal does not suspend proceedings in the court from which the appeal is taken, in the absence of a stay of proceedings. What proceedings are permissible where a stay of proceedings is effected has already been considered.[11]

—— **Opening judgment or order.** The opinions are in conflict as to whether, pending an appeal from a judgment or order, a motion can be made in the lower court to set it aside.[12]

—— **Amendment of judgment or order.** The judgment or order appealed from may be amended after an appeal is taken.[13] For instance, where the question of costs is not presented on appeal, the trial court retains the power to modify its judgment as to costs.[14]

—— **Actions relating to judgment appealed from.** The taking an appeal from a judgment does not bar an action thereon, nor does it bar an action on a special agreement to be answerable for the judgment.[15]

[9] See ante, § 2578.

[10] Veeder v. Baker, 83 N. Y. 163.

[11] See ante, § 2691.

[12] That a motion lies, see Belmont v. Erie R. Co., 52 Barb. 637, and Strong v. Hardenburgh, 25 How. Pr. 438. That a motion does not lie, see Tinkey v. Langdon, 60 How. Pr. 180.

[13] Guernsey v. Miller, 80 N. Y. 181; National City Bank v. New York Gold Exch. Bank, 97 N. Y. 645.

[14] Genet v. Delaware & Hudson Canal Co., 136 N. Y. 217.

[15] Rice v. Whitlock, 16 Abb. Pr. 225.

—— **Renewal of motion.** It has been held that a second motion for the same relief can be made pending an appeal taken from a denial of the first motion,[16] but it has also been held that by appealing from an order denying a motion with leave to renew the same, the appellant is precluded from taking advantage of the leave to renew.[17]

—— **Motion for new trial.** The pendency of an appeal from the judgment is no bar to a motion for a new trial in the court below.[18] Furthermore, a judge at special term may entertain a formal motion for a new trial though he has denied a motion therefor on his minutes and an appeal from such denial is pending.[19]

—— **Appointment of receiver.** A receiver may be appointed, pending an appeal, to preserve the property involved.[20]

—— **Injunction.** Where a perpetual injunction has been denied, the court has no power to grant one pending an appeal.[21]

—— **Proceeding with trial after appeal from interlocutory determinations.** An appeal from an order denying a motion to frame issues for trial by a jury does not require a delay of the trial, in the absence of a stay of proceedings.[22] It is proper to notice a case for trial in the lower court, after an appeal from an interlocutory judgment, where there is no stay of proceedings.[23]

—— **Matters relating to record.** The lower court does not, by reason of the appeal, lose its jurisdiction to do anything for

[16] Benedict & B. Mfg. Co. v. Thayer, 20 Hun, 547.

[17] Harrison v. Neher, 9 Hun, 127.

[18] Henry v. Allen, 147 N. Y. 346; Smith v. Lidgerwood Mfg. Co., 60 App. Div. 467, 69 N. Y. Supp. 975; Vernier v. Knauth, 7 App. Div. 57, 38 N. Y. Supp. 784.

[19] Schmidt v. Cohn, 12 Daly, 134.

[20] Colwell v. Garfield Nat. Bank, 4 N. Y. Supp. 5.

[21] Campbell & Thayer Co. v. Frost, 24 Misc. 87, 52 N. Y. Supp. 487.

[22] Where motion was denied with leave to renew, and defendant appealed instead of renewing the motion, it was held proper to refuse to delay the trial until a decision on the appeal. Smith v. Fleischman, 23 App. Div. 355, 48 N. Y. Supp. 234.

[23] Ward v. Smith, 103 App. Div. 375.

the presentation of the case in the appellate court. A court of record has inherent power to correct its own record by a nunc pro tunc order, even after an appeal is taken, since, though it loses jurisdiction of the case, it does not of the record.[24] It is well settled that the supreme court has power, after an appeal to the court of appeals, to authorize an amendment of its record in order that the same may be made to speak the truth of all the facts appearing before it.[25] This authority is frequently exercised, especially by permitting a statement that the determination of the appellate division was on the law or on the facts or on both the law and the facts.[26] There is no authority, however, it would seem, for the supreme court, after the case is finally disposed of by the court of appeals, to permit an amendment of its record.[27] So where a case has been argued and submitted in the court of appeals, and a decision reached, some years after the decision of the appellate division, the court of appeals will not grant a request to suspend its decision to give an opportunity to apply to the lower court for an order showing a reversal on the facts as well as on the law.[28] The power to correct the record does not, however, authorize the allowance of a new record. The theory on which amendments to records are made by the trial court, after an appeal is taken, is that a new record is not made but that an existing record is so corrected as to bear true evidence of what actually occurred. Where a record is changed after the appeal is perfected, the change is unauthorized and ineffective unless there was something actually existing in the past which made a change necessary in order to a full or accurate expression of

[24] People ex rel. Hoffman v. Board of Education, 141 N. Y. 86. Appellate court cannot correct the record. People v. Hoch, 150 N. Y. 291, 305, 566; Pratt v. Baker, 88 Hun, 301, 34 N. Y. Supp. 766; Ropes v. Arnold, 85 Hun, 619, 32 N. Y. Supp. 911.

[25] National City Bank v. New York Gold Exch. Bank, 97 N. Y. 645.

[26] See post, § 2824.

[27] Drake v. New York Iron Mine, 38 App. Div. 71, 55 N. Y. Supp. 920, in which case leave to file conclusions of law presented and referred by the trial judge and directing them to be annexed to the judgment-roll, was reversed.

[28] Hamlin v. Sears, 82 N. Y. 327.

the truth.[29] The record cannot be amended, by the lower court, pending an appeal, so as to make it contain matters not before the trial court at the time the judgment or order appealed from was rendered.[30]

It has been held that the trial court has no power to strike from the record on appeals an affidavit specified in the order appealed from as one of the motion papers on which the order was granted, since the remedy, if the printed papers were not the papers read before the trial court, was to apply to the appellate court to correct the papers.[31]

Where an appellant desires an extension of time to serve his appeal papers, he must apply to the lower court and not to the appellate court.[32]

§ 2702. Effect on judgment or order appealed from.

The judgment or order appealed from is not annulled by the appeal.

—— **Judgment as estoppel.** An appeal from a judgment does not suspend its operation as an estoppel.[33]

—— **Lien of judgment.** The lien of a judgment is not impaired by an appeal [34] except where the court, on motion, orders a suspension of the lien.[35]

—— **Judgment as subject of set-off.** An appeal suspends the right to set-off the judgment appealed from against another judgment,[36] or against costs of a motion in the same suit.[37]

[29] Elliott, App. Proc. p. 464.

[30] Matter of Baker, 54 App. Div. 21, 66 N. Y. Supp. 242.

[31] People ex rel. Mulligan v. Collis, 8 App. Div. 618, 40 N. Y. Supp. 934.

[32] Wetter v. Erichs, 21 App. Div. 475, 47 N. Y. Supp. 688; Rothschild v. Rio Grande Western R. Co., 9 App. Div. 406, 41 N. Y. Supp. 293.

[33] Parkhurst v. Berdell, 110 N. Y. 386.

[34] Matter of Berry, 26 Barb. 55. But a reversed judgment, pending a further appeal, is not a lien. Foot v. Dillaye, 65 Barb. 521.

[35] Volume 3, p. 2806.

[36] DeCamp v. Thomson, 159 N. Y. 444; Pierce v. Tuttle, 51 How. Pr. 193.

[37] Hardt v. Schulting, 24 Hun, 345.

§ 2703. Appeal as enlarging time.

There are various Code provisions which provide that the time during which proceedings are stayed by an appeal shall not be counted in computing the time within which an act must be performed. These provisions, however, relate only to an appeal which, by the giving of an undertaking or otherwise, operates as a stay of proceedings. An appeal from an order granting a favor to the party appealing does not enlarge the time within which the favor is limited.[38]

§ 2704. Waiver by taking of appeal.

Taking an appeal waives an irregularity in the mode of entering judgment.[39] It does not, however, waive the right to move for a retaxation of costs included in the judgment appealed from,[40] nor the taxing of costs against an executor or administrator without order of court, in a case where an order is necessary to entitle the party to costs, especially where the costs were adjusted after the appeal was taken.[41]

[38] Ferry v. Bank of Central New York, 9 Abb. Pr. 100.
[39] City of New York v. Lyons, 1 Daly, 296, 24 How. Pr. 280.
[40] Volume 3, p. 3036.
[41] Howe v. Lloyd, 9 Abb. Pr. (N. S.) 259.

CHAPTER X.

PAPERS ON APPEAL.

ART. I. APPEAL TO COURT OF APPEALS.

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ART. III. APPEAL TO SUPREME COURT FROM INFERIOR COURT.

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ART. I. APPEAL TO COURT OF APPEALS.

§ 2705. Contents of return on appeal from final judgment.

On appeal from a final judgment, the return consists of a copy of the judgment roll and of the case and notice of exceptions, if any, filed after the entry of judgment, and a certified copy of the judgment given thereon and of the notice of appeal.[1]

The contents of the judgment roll has been stated.[2] When judgment of affirmance is rendered upon the appeal to the appellate division, the "judgment roll consists of a copy of the judgment annexed to the papers, upon which the appeal was heard. Where subsequent proceedings are taken, at the special term or trial term, before the entry of final judgment, the judgment roll must also contain the proper papers relating thereto."[3]

The case made on the first trial is not a proper part of the record on an appeal from the judgment on a second trial.[4]

§ 2706. Contents of return on appeal from order.

On an appeal from an order, or a part of an order, the return consists of a certified copy of the notice of appeal, of the order, and of the papers on which the order was founded.[5] Unnecessary and superfluous papers need not be printed, however.[6]

[1] Code Civ. Proc. § 1315. Record must be practically the same as used in appellate division. New York Cable Co. v. City of New York, 104 N. Y. 1, 39; Hobart v. Hobart, 85 N. Y. 637.
[2] Vol. 3, pp. 2787–2789.
[3] Code Civ. Proc. § 1354.
[4] Wilcox v. Hawley, 31 N. Y. 648.
[5] Code Civ. Proc. § 1315.
[6] See Weseman v. Wingrove, 85 N. Y. 353, 358, and see post, § 2717.

§ 2707. Certification.

Prior to 1890, section 1315 of the Code required the return on an appeal from a final judgment to consist of a "certified" copy of the notice of appeal, judgment roll, etc. In 1890 the Code was amended so as to require a copy of the judgment roll, case, etc., and a "certified" copy of the judgment and of the notice of appeal.

Section 3301 of the Code, prior to 1890, provided that "where the attorneys for all the parties interested, other than parties in default, or against whom a judgment or final order has been taken, and is not appealed from, stipulate in writing that a copy of any paper whereof a certified copy is required by [the Code], the stipulation takes the place of a certificate, as to the parties so stipulating, and the clerk is not required to certify the same, or entitled to any fees therefor." In 1890 section 3301 was amended by adding a provision that a paper so proved by stipulation be received by the clerks of all the courts and by the courts, and be used or filed with the same force and effect as if certified by a clerk of the court.

It is the practice of the court of appeals to receive and file returns not certified by the clerk of the court below, when accompanied by a stipulation of the attorneys, but since section 1315 of the Code no longer requires on an appeal from a judgment "a certified copy of the judgment roll and of the case and notice of exception, if any" but only requires "a copy" thereof, it has, in some instances, been claimed that the stipulation, authorized by section 3301, that a paper is "a copy of any paper whereof a certified copy is required," is not necessary in so far as the judgment roll, case and notice of exceptions, if any, are concerned, but only for the judgment appealed from and the notice of appeal, of which alone a "certified" copy is now required by section 1315 of the Code.[7] It is the safer practice, however, to either obtain a certified copy, or a stipulation that the paper is a true copy, of all the papers.

On an appeal from an "order," all the necessary papers must either be certified or stipulated to be true copies.

[7] Smith, Ct. of App. Pr. 16, 17.

A statement "return certified as required by law" is not a substitute for a certificate of settlement of the case.[8]

—— Form of stipulation.

[Title of court and cause.]

It is hereby stipulated, by and between the attorneys for the parties herein, pursuant to section 3301 of the Code of Civil Procedure, that the foregoing copies are true and correct copies of the judgment roll, the notice of appeal, the case and exceptions herein, and the judgment of the appellate division, as filed in the office of the clerk of ——— county, and of the whole thereof; and that the appeal in this case be heard on said papers without certification thereof, which is hereby waived.

[Date.] [Signature of attorneys.]

§ 2708. Person to send papers.

The papers constituting the return are to be transmitted to the appellate court by the clerk on whom the notice of appeal was served.[9]

§ 2709. Time for transmission.

The return must be transmitted to the appellate court within twenty days after the appeal is perfected, i. e., the notice of appeal is served and filed and an undertaking given.[10]

A judge of the court from which the appeal is taken has no authority to extend the time for filing the return,[11] except as provided for by statute on an appeal from a judgment on a verdict subject to the opinion of the appellate division.[12]

§ 2710. Filing.

The clerk of the court of appeals must file the papers transmitted to him as constituting the return.[13]

[8] Matter of Bailey, 85 N. Y. 629.
[9, 10] Code Civ. Proc. § 1315.
[11] Mead v. Smith, 18 Wkly. Dig. 221.
[12] Code Civ. Proc. § 1339, last sentence.
[13, 14] Code Civ. Proc. § 1315.

§ 2711. Procedure on failure to file return.

If the appellant fails to cause the return to be transmitted within the twenty days allowed, the respondent may cause the papers to be transmitted, and may tax the expense thereof as a disbursement if he recovers costs.[14] Or, instead, the "respondent may, by notice in writing, require such return to be filed within ten days after the service of the notice, and if the return be not filed in pursuance of such notice, the appellant shall be deemed to have waived the appeal; and on an affidavit proving that the appeal was perfected, and the service of such notice, and a certificate of the clerk that no return has been filed, the respondent may enter an order with the clerk dismissing the appeal for want of prosecution, with costs; and the court below may thereupon proceed as though there had been no appeal."[15] The clerk, on receiving from the respondent's attorney the affidavit prescribed by this rule, will, if the return has not been filed, make a certificate to that effect, and enter, in an established form, the proper order (which need not be darfted by the attorney), and furnish a certified copy thereof.[16]

§ 2712. Defects in return.

If the return made by the clerk of the court below is defective, either party may, on an affidavit specifying the defect, and on notice to the opposite party, apply to one of the judges of the court of appeals for an order that the clerk make a further return without delay.[17]

The respondent cannot return the case and, on the failure to serve another, enter an order dismissing the appeal.[18]

§ 2713. Case.

"In all calendar causes a case shall be made by the appellant, which shall consist of a copy of the return, and the reasons of

[15] Rule 1 of court of appeals.

[16] Smith, Ct. of App. Pr., 26.

[17] Rule 2 of the court of appeals. Documents not a part of the record in the appellate division cannot, however, be ordered added by the court of appeals. State v. Cromwell, 104 N. Y. 664.

[18] Bliss v. Hoggson, 84 N. Y. 667.

the court below for its judgment, or an affidavit that the same cannot be procured, together with an index to the pleadings, exhibits, depositions, and other principal matters. Every opinion in the cause at special term, as well as at the appellate division of the supreme court, relating to the questions involved in the appeal, is included by the foregoing provision." [19]

In short the case consists of (1) a copy of the return, (2) opinions or certificate that there are none, (3) and an index.

The case in the court of appeals is usually referred to as the "appeal book."

A reference to the volume and page of the reports in which the opinion is printed is not a compliance with this rule since the opinion itself must be printed in full in the case.[20]

—— **Printing.** "All cases and points, and all other papers furnished to the court in calendar causes, shall be printed on white paper, as provided in section 796 of the Code of Civil Procedure. The folio, numbering from the commencement to the end of the case, shall be printed on the outer margin of the page. Small pica is the smallest letter and most compact mode of composition which is allowed. No charge for printing the papers mentioned in this rule shall be allowed as a disbursement in a cause unless the requirements of the preceding sentence shall be shown, by affidavit, to have been complied with in all papers printed." [21]

—— **Filing of copies.** Except on "appeals from orders entitled to be heard as motions," sixteen copies of the case and points must be filed with the clerk of the court of appeals at least twenty days before the case is placed on the day calendar.[22] In the former case, the sixteen copies must be delivered to the clerk at or before the argument or submission of the appeal.[23]

—— **Service on attorney for adverse party.** "Within forty days after the appeal is perfected, the appellant shall serve

[19] Rule 4 of the court of appeals.
[20] Bastable v. City of Syracuse, 72 N. Y. 64.
[21] Rule 5 of the court of appeals.
[22] Rule 7 of the court of appeals.
[23] Smith, Ct. of App. Pr. 72c, 73.

three printed copies of the case on the attorney of the adverse party. If he fail to do so, the respondent may, by notice in writing, require the service of such copies within ten days after service of the notice, and, if the copies be not served in pursuance of such notice, the appellant shall be deemed to have waived the appeal; and on an affidavit proving the default and the service of such notice, the respondent may enter an order with the clerk dismissing the appeal for want of proscution, with costs; and the court below may thereupon proceed as though there had been no appeal.'' [24]

This rule applies to an entire failure to serve copies of a case. The remedy for service of copies of an imperfect case is to move to have the case corrected and proper copies served or the appeal dismissed.[25] It is no excuse for the failure to serve copies of the case that the appellant has not caused the return to be made and filed.[26]

On receipt of an affidavit from the respondent's attorney, proving the default and service of notice, the clerk will enter the proper order (which need not be drafted by the attorney) dismissing the appeal, with costs, and will transmit a certified copy thereof to the respondent's attorney. If the return has been filed, a remittitur will be issued and transmitted with the order.[27]

A motion to reinstate the appeal will not be heard where the remittitur has been sent down, judgment entered thereon and execution issued.[28] It has been held that the default ought not to be opened, as a matter of favor, unless there is some reason to think that the judgment so obtained is not in strict conformity with the real merits and equity of the causes,[29] though it has also been held that defaults in serving copies of the case will be opened on terms where no delay or inconvenience has

[24] Rule 6 of the court of appeals. Formerly rule 7.
[25] Bowers v. Tallmadge, 23 N. Y. 166; Bliss v. Hoggson, 84 N. Y. 667.
[26] Sage v. Volkening, 46 N. Y. 448.
[27] Smith, Ct. of App. Pr. 50.
[28] Jones v. Anderson, 71 N. Y. 599.
[29] Keuka Nav. Co. v. Holmes, 98 N. Y. 655.

resulted to respondent therefrom and it appears that the appeal was brought in good faith.[30]

§ 2714. Case on appeal from judgment on verdict subject to opinion of the court.

Where an appeal to the court of appeals, from a judgment, rendered by the appellate division, upon a verdict subject to the opinion of the court, has been perfected, a case, containing a concise statement of the facts, of the questions of law arising thereupon, and of the determination of those questions by the appellate division, must be prepared and settled, by or under the direction of the court below, and annexed to the judgment roll. A certified copy of the case must be transmitted to the court of appeals instead of the case upon which the judgment of the court below was rendered. The court below, or a judge thereof, may extend the time, by law, within which the papers must be transmitted to the court of appeals, for the purpose of enabling the appellant to procure the case to be prepared or settled.[31]

If such a case is not prepared, the appeal will be dismissed,[32] unless the action is one in which a verdict subject to the opinion of the court cannot be directed.[33]

ART. II. APPEAL TO APPELLATE DIVISION FROM TRIAL OR SPECIAL TERM.

§ 2715. General considerations.

The General Rules of Practice (rule 38) specify what are enumerated motions and then states that all other motions are non-enumerated motions. The rule is confusing because it includes certain "appeals" as enumerated "motions." It should

[30] Waterman v. Whitney, 7 How. Pr. 407.

[31] Code Civ. Proc. § 1339.

[32] Reinmiller v. Skidmore, 59 N. Y. 661; People v. Featherly, 131 N. Y. 597.

[33] Cowenhoven v. Ball, 118 N. Y. 231. When verdict subject to opinion of court may be directed, see vol. 2, p. 2288.

be rewritten and made more specific so that there would be no question as to what it means. The importance of distinguishing between the kinds of orders is emphasized by rule 41 of the General Rules of Practice which differentiates between the two orders in so far as the record on appeal is concerned. Rule 41 could be much simplified by first stating the rules applicable to the record on all appeals and then referring separately to the record on appeals from final judgments, interlocutory judgments, enumerated orders, and non-enumerated orders.

The rules relating to the preparation of a case, or case and exceptions, have been set forth in a preceding volume.[34]

§ 2716. Party to furnish papers.

The papers must be furnished by the appellant.[35]

§ 2717. Contents of record.

The Code provides that an appeal to the appellate division from a final judgment of the supreme court must be heard upon a certified copy of the notice of appeal, of the judgment roll, and of the case or notice of exceptions, if any, filed, as prescribed by law or the general rules of practice, after the entry of the judgment, and either before or after the appeal is taken.[36] The judgment roll should immediately follow the notice of appeal and the case and exceptions should be last.[37]

[34] Vol. 3, pp. 2651–2682.

[35] Rule 41 of the General Rules of Practice provides that the papers must be furnished by appellant except on appeals from nonenumerated motions, but it is submitted that, notwithstanding that the language is clear, it was not intended to prescribe a different rule for appeals from nonenumerated motions.

[36] Code Civ. Proc. § 1353, Rule 41 of the General Rules of Practice. On an appeal from the judgment entered on nonsuit or general verdict, where questions of fact are submitted to the jury before deciding the motion for a nonsuit or directed verdict, such special or general verdict shall form a part of the record. Code Civ. Proc. § 1187. Appeal has been dismissed where record contained no judgment roll. Reid v. City of New York, 50 State Rep. 758.

[37] Brady v. Powers, 105 App. Div. 476, 94 N. Y. Supp. 259.

It also provides that such an appeal from an interlocutory judgment, or from an order, must be heard on a certified copy of the notice of appeal, and of the papers used before the court, judge or justice, on the hearing of the demurrer, application, or motion, as the case requires.[38] If no judgment was entered, the record, on an appeal from an enumerated order, must also contain the pleadings and the minutes of trial.[39]

The General Rules of Practice provide that the papers in all "appeals from non-enumerated motions" shall consist of printed copies of the papers which were used in the court below, and are specified in the order, certified by the proper clerk, or stipulated by the parties to be true copies of the original, and of the whole thereof.[40]

Only the papers recited in the order appealed from will be considered.[41] It follows that additional affidavits served after the making of the order, though served by leave of court, should not be embodied in the record as they will not be reviewed.[42] If all the motion papers are not contained in the record, and neither party has taken any steps to correct the record nor has objected thereto, the appeal will be dismissed.[43]

[38] Code Civ. Proc. § 1353. See, also, rule 41 of the General Rules of Practice. That rule applies to appeal from order confirming report of arbitrators, see Matter of Poole, 32 Hun, 215.

[39] Rule 41 of the General Rules of Practice.

[40] Rule 41 of the General Rules of Practice. Case and exceptions are not required. Matter of Gowdey's Estate, 101 App. Div. 275, 91 N. Y. Supp. 662.

[41] Thomson v. Fairfield, 67 Hun, 648, 21 N. Y. Supp. 712. See, also, Matter of Gowdey's Estate, 101 App. Div. 275, 91 N. Y. Supp. 662.

[42] Wells, Fargo & Co. v. Wellsville, C. & P. C. R. Co., 12 App. Div. 47, 42 N. Y. Supp. 225. An affidavit printed at the end of an appeal book, which does not purport to have been verified until the day after the order appealed from was entered, is not properly a part of the record, and hence cannot be considered by the appellate court. Cameron v. White, 92 N. Y. Supp. 381.

[43] Whipple v. Ripson, 29 App. Div. 70, 51 N. Y. Supp. 635. Levey v. Dennett, 25 Misc. 768, 55 N. Y. Supp. 612; Niles v. New York Cent. & H. R. R. Co., 13 App. Div. 549, 43 N. Y. Supp. 734; Cameron v. White, 92 N. Y. Supp. 381. Record not containing judgment-roll which was

It would seem, however, and it is so held by the court of appeals, that the rule is not to be so strictly construed as to compel the printing of unnecessary and superfluous papers;[44] and the General Rules of Practice provide that "where, upon non-enumerated motions, voluminous documents have been used which are material only as to the fact of their existence, or as to a small part of their contents, the parties may, by stipulation, or the court or judge below may, upon notice, settle a statement respecting the same, or the parts thereof to be returned upon the appeal from the order, to be used in place of the original documents."[45] This power to excuse the printing of clearly immaterial and irrelevant portions of the papers on which a motion is heard should, however, be sparingly exercised.[46] It has been held that where the order specifies no motion papers, the return does not show that the printed papers were read or used on the motion, and there is no stipulation by the attorneys, the order will be reversed.[47] If the printed papers on appeal are not the motion papers recited in the order, the proper remedy of the party aggrieved is to apply to the appellate court to correct the printed papers.[48] But if the special term improperly strikes out and refuses to consider papers properly before it on a motion, the moving party, on an appeal from the order, may print them so that the appellate court may decide whether the refusal to consider them was proper.[49]

one of the motion papers. Binghamton Trust Co. v. Grant, 65 App. Div. 178, 72 N. Y. Supp. 580.

[44] Weseman v. Wingrove, 85 N. Y. 353, 358.

[45] Rule 34 of the General Rules of Practice. See Wheeler v. Falconer, 30 Super. Ct. (7 Rob.) 45, 46, which held that printing of papers could be dispensed with only by order of court.

[46] Manhattan R. Co. v. Taber, 7 Misc. 347, 27 N. Y. Supp. 860. Followed in City Real Estate Co. v. Gaylor, 31 Misc. 105, 64 N. Y. Supp. 1066.

[47] Matter of Burnham, 64 App. Div. 596, 72 N. Y. Supp. 300.

[48] So long as the order remains in the form in which it is entered, the lower court has no right to require the appeal to be heard on different or other papers than those on which the motion was decided. People ex rel. Mulligan v. Collis, 8 App. Div. 618, 40 N. Y. Supp. 934.

[49] Evans v. Silbermann, 7 App. Div. 139, 141, 40 N. Y. Supp. 298.

Each affidavit or other paper printed, upon an appeal from an order made on a non-enumerated motion, shall be preceded by the statement of what it is and on whose behalf it is read.[50]

—— **Opinion of court below.** The record must also contain the opinion of the court below, or an affidavit that no opinion was given, or, if given, that a copy could not be procured. This applies irrespective of whether the appeal is from a judgment, an order made on an enumerated motion or an order made on a non-enumerated motion.[51] The opinion being a part of the record, it may be referred to the same as any other paper in the record,[52] though it would seem that the court cannot reverse for error appearing in the opinion but not otherwise in the record.[53]

—— **Statement of fact required by rule 41.** Except on appeals from non-enumerated motions, there shall be prefixed to the papers a statement showing the time of the beginning of the action or special proceeding, and of the service of the respective pleadings; the names of the original parties in full; and any changes in the parties, if such has taken place.[54]

§ 2718. Ordering case and exceptions filed.

The Code provides that if "the appeal is from a judgment the printed case and exceptions must be ordered filed by the justice or referee before whom the case was tried."[55] It will be noticed that the Code requires an order to file the case and exceptions when the appeal is from a judgment but makes no like provision as to appeals from orders. It is held, however, that it was the plain intention of this Code section to require the judge, in all actions where an appeal is based on a case, to order the printed papers on file.[56]

[50] Rule 43 of General Rules of Practice.

[51] Rule 41 of General Rules of Practice.

[52] Bryant v. Allen, 54 App. Div. 500, 504, 67 N. Y. Supp. 89. Followed in Crossman v. Wyckoff, 64 App. Div. 554, 558, 72 N. Y. Supp. 337.

[53] See post, § 2784.

[54] Rule 41 of General Rules of Practice.

[55] Code Civ. Proc. § 1353.

[56] Odendall v. Haebler, 91 App. Div. 372, 86 N. Y. Supp. 599.

§ 2719. Indexing the case.

The case must be indexed, and the index of the exhibits must concisely indicate the contents or nature of each exhibit.[57] The cause has been stricken from the calendar because of failure to index the case.[58]

§ 2720. Certification of papers.

All the copies of papers necessary to constitute the record, except a copy of the opinion of the lower court, must be certified by the proper clerk or be stipulated by the parties to be true copies of the original.[59] Section 3301 of the Code, as already set forth,[60] authorizes a stipulation in place of a certificate.[61]

§ 2721. Filing of papers.

"Unless the appellate division shall in a special case otherwise direct, before an appeal shall be placed on the calendar, the appellant shall file with the clerk of the appellate division the case and exceptions or the other papers, on which the appeal shall be heard, printed as required by the rules of practice." [62]

—— **Time.** Except on appeals from orders made on nonenumerated motions,[63] the printed record must be filed in the office of the clerk of the appellate division within twenty days after the appeal is taken, except that where it is necessary to make a case or case and exceptions after the appeal shall have been taken, the papers shall be filed within twenty days after the settlement and filing of the case.[64] On appeals from

[57] Rule 43 of General Rules of Practice.
[58] Reid v. City of New York, 50 State Rep. 758, 21 N. Y. Supp. 719.
[59] Rule 41 of General Rules of Practice.
[60] See ante, § 2707.
[61] Form of stipulation, see ante, § 2707.
[62] Code Civ. Proc. § 1353.
[63] What are nonenumerated motions, see vol. 1, pp. 17, 168.
[64] Rule 41 of the General Rules of Practice. Time for making and service of case, see vol. 3, p. 2656.

orders made on non-enumerated motions, the papers shall be filed with the clerk within fifteen days after the appeal is taken.[65]

Extensions of time to file and serve appeal papers, on an appeal to the appellate division, cannot be obtained from the appellate division but the motion must be made in the court below.[66]

§ 2722. Service.

Three printed copies of the papers must be served on the attorney for the respondent at the same time that the papers are filed with the clerk.[67]

§ 2723. Procedure on failure to file or serve.

If the papers constituting the record are not filed and served, as provided by General Rule 41, by the appellant, respondent may move the court on three days' notice, on any motion day, for an order dismissing the appeal, or for a judgment in his favor, as the case may be.[68] If the appeal is from an order made on a non-enumerated motion, the motion must be to dismiss the appeal as that is the only relief which may be granted.[69]

§ 2724. Delivery of copies before argument.

At the beginning of the argument of any appeal, the party whose duty it is to furnish the papers shall deliver to the clerk thirteen copies thereof, and each party shall deliver to the clerk thirteen copies of his briefs and points. The appellate division in any department may require further copies of the papers and briefs to be delivered in their discretion.[70]

[65] Rule 41 of General Rules of Practice.

[66] Wetter v. Erichs, 21 App. Div. 475, 47 N. Y. Supp. 688 (mem).

[67-69] Rule 41 of General Rules of Practice.

[70] Rule 43 of General Rules of Practice. In the first department sixteen copies of the papers on which the appeal is to be heard, with an

§ 2725. Separate records.

Although separate actions involving the same questions are tried together, separate records should be prepared for the purpose of appeal.[71] So separate records should be made on an appeal from separate orders.[72]

§ 2726. Conclusiveness.

Appellant is bound by the recitals in the record where he has made no application for an amended return.[73]

§ 2727. Defects in record.

If the record is incomplete or defective in any way, the proper practice is to move in the lower court, at the earliest opportunity, to amend such record. If such a motion is not made, the defect may necessitate a dismissal of the appeal, though where, in case an appeal from a judgment in favor of defendant be dismissed, great injury would probably result to appellant, the appeal will not be dismissed on the ground that certain of the statements in the record, concerning the trial, were indefinite and uncertain.[74] A reargument has been ordered to give time to amend the record so as to enable the appellate court to consider the exceptions taken.[75]

affidavit showing the service of three printed copies on the attorney for the respondent, must be filed with the clerk at least eight days before the term, together with the notice of argument with admission of proof of service. If not so filed, the appeal may be dismissed. In fourth department, sixteen copies must be filed within fifteen days after the service of the printed papers.

[71] O'Gorman v. New York & Q. C. R. Co., 96 App. Div. 594, 89 N. Y. Supp. 589; Tuffey v. Brooklyn Union Gas Co., 102 App. Div. 416, 92 N. Y. Supp. 489.

[72] Matter of Swezey, 64 How. Pr. 331.

[73] Manning v. Ferrier, 27 Misc. 522, 58 N. Y. Supp. 332; Kutner v. Fargo, 34 App. Div. 317, 54 N. Y. Supp. 332.

[74] Midler v. Lese, 45 Misc. 637, 91 N. Y. Supp. 148.

[75] Chevra Bnei Israel Aushe Yanova und Motal v. Chevra Bikur Cholim Aushe Rodof Sholem, 23 Misc. 367, 51 N. Y. Supp. 236.

The power of the lower court to amend the record after an appeal has been taken has already been considered.[76]

ART. III. APPEAL TO SUPREME COURT FROM INFERIOR COURT.

§ 2728. Return.

No particular rules not already referred to can be laid down as to the papers on an appeal to the supreme court from an inferior court, except on appeals from the city court of New York city. The return consists of the same papers necessary to be transmitted on an appeal from the appellate division to the court of appeals.[77] The Code provisions relating to the hearing of an appeal from the trial or special term to the appellate division apply except in so far as changed by section 1345 of the Code.[78]

—— **Certified copies of papers.** Section 1315 of the Code requiring certain of the appeal papers to be "certified" copies, as read in connection with section 3301 of the Code permitting a stipulation of the parties to take the place, applies to appeals to the supreme court from an inferior court. What has been said in regard thereto in the article on appeals to the court of appeals[79] applies equally well to appeals to the supreme court from an inferior court.

§ 2729. Appeal from city court of New York city.

"In appeals from the city court, in case the appellant does not cause the return to be filed with the clerk of the said Appellate Term of the court and print and serve three copies thereof upon the attorney for the respondent, printed as required by the general rules of practice, within ten days after service of the notice of appeal, the respondent may move, upon five days' notice, on the first day of any term of such court, to

[76] See ante, § 2701.
[77] Code Civ. Proc. § 1315. See ante, §§ 2705, 2706.
[78] Code Civ. Proc. § 1344.
[79] See ante, § 2707.

dismiss the appeal, and the appeal shall be dismissed unless the time of the appellant to cause such return to be filed and copies thereof printed and served be extended by such appellate term for good cause shown." [80]

An extension of the time to file a return will not be granted because of the engagement of counsel where the appeal is taken on technical grounds not affecting the merits.[81]

[80] Rule 3 appellate term rules.
[81] Goelet v. Lawlor, 19 Misc. 541, 43 N. Y. Supp. 1071.

CHAPTER XI.

BRIEFS OR POINTS.

ART. I. GENERAL RULES.

Definition of "points," § 2730.
Proof of service, § 2731.
Waiver of objections, § 2732.

ART. II. IN COURT OF APPEALS.

Filing and service, § 2733.
—— Reply and supplemental points.
—— Exceptions to rule.
—— Effect of violation of rule.
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—— Statement of facts.
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ART. III. IN APPELLATE DIVISION.

Rule 43, § 2735.
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—— In first department.
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—— Statement of facts.
—— Citation of statutes.
—— Citation of cases.
—— Effect of failure to discuss exceptions.

ART. I. GENERAL RULES.

§ 2730. Definition of "points."

The rules of practice refer to "points" instead of to briefs. The term "points," as used in the rules, means the entire

printed argument and not merely the head of the argument with the authorities cited.

§ 2731. Proof of service.

Service on the opposing attorney should be proved by filing with the clerk an affidavit or admission of service, with the copies of the points required to be filed with the clerk.

§ 2732. Waiver of objections.

The service of the required number of copies, and the time for serving, as between the parties, may be regulated by stipulation, though it would seem that the rule is otherwise as to filing copies with the clerk.

ART. II. IN COURT OF APPEALS.

§ 2733. Filing and service.

At least twenty days before a cause is placed on the day calendar, the appellant shall file with the clerk sixteen copies, and serve on the attorney or counsel for the respondent three printed copies, of the points to be relied on by him with a reference to the authorities to be cited. Within ten days after such service the respondent shall file with the clerk sixteen printed copies, and serve on the attorney or counsel for the appellant, three printed copies, of the points to be relied on by him, with a reference to the authorities to be cited.[1]

—— **Reply and supplemental points.** If the appellant desires to present points on authorities in reply, he shall file with the clerk sixteen printed copies thereof and serve three printed copies on the attorney or counsel for the respondent within five days after receipt of the respondent's points; and no supplemental points will be allowed from either side unless specially requested by the court.[2]

—— **Exceptions to rule.** This rule, so far as it relates to the filing and service of the printed points, does not apply to "ap-

1-4 Rule 7 of the court of appeals.

peals from orders entitled to be heard as motions," and in all cases to be argued during the first two weeks of any term commencing next after making of a new calendar, the parties shall file the printed papers, and file and serve or exchange the printed points, at least two days before the causes shall be placed upon the day calendar.[3]

——**Effect of violation of rule.** No points will be received by the court on argument or submission unless filed and served as provided by the rule,[4] except, it would seem, that service on the opposing attorney may be regulated by stipulation and that objections may be waived.

§ 2734. Contents.

The brief should specifically call the attention of the court to the exceptions as to which the authorities cited relate.[5]

——**Statement of facts.** "In all causes each party shall briefly state upon his printed points, in a separate form, the leading facts which he deems established, with a reference to the folios where the evidence of such facts may be found. And the court will not hear an extended discussion upon any mere question of fact."[6]

This rule necessarily excludes from every brief, prepared for use in the court of appeals, lengthy quotations from the evidence, particularly in a case of unanimous affirmance where the Constitution prohibits a review of the evidence. The rule calls for the facts and not the evidence. Except where there is a reversal by the appellate division, or an affirmance by a divided court and it is claimed that there is no evidence whatever to support a fact which is necessary to sustain the judgment, only those facts should be mentioned which are either specifically found or are presumed to have been found, according to the rules governing appeals to the court of appeals. Even when the affirmance is not unanimous, counsel should not state, as established facts, all allegations they may think are supported by the weight of the evidence.[7]

[5] Nelson v. Village of Canisteo, 100 N. Y. 89.
[6] Rule 8 of the court of appeals.
[7, 8] Stevens v. O'Neill, 169 N. Y. 375.

—— **Citation of authorities.** Extended quotations from authorities are condemned.[8]

ART. III. IN APPELLATE DIVISION.

§ 2735. Rule 43.

Rule 43 of the General Rules of Practice provides as to the paper, size of page, type, folioing, etc., of briefs furnished in the appellate division.

§ 2736. Filing and service.

Special rules in the various departments of the appellate division fix the practice in relation to the filing and service of briefs.

—— **In first department.** In the first department, (rules 4 and 5) both on enumerated and non-enumerated appeals, the appellant must file with the clerk of the appellate division at least eight days before the day on which such appeal shall have been noticed, sixteen copies of the brief with an affidavit showing the service of three printed copies thereof on the attorney for the respondent.

—— **In second department.** In the second department, on the enumerated calendar, appellant must file with the clerk thirteen copies and serve on respondent's attorney three copies, at least ten days before the cause is placed on the day calendar. Within five days thereafter the respondent must file with the clerk thirteen copies and serve three copies on appellant's attorney. If a reply brief is prepared thirteen copies must be filed and three served on respondent's attorney, within three days thereafter.

—— **In third department.** In the third department (rule 15) thirteen copies of the points must be filed with the clerk before the commencement of the argument. Three copies of appellant's brief must be served on respondent's attorney at least twenty days before a term of the appellate division at which a cause may be noticed for argument, and three copies of respondent's brief must be served on appellant's attorney at least

eight days before said term. The service may be by mail but it does not extend the time within which the answering brief may be served. A violation of this rule in that appellant fails to serve his brief until fifteen days before the term, though the rule fixes no penalty for disobedience thereof, may be punished by putting the cause over the term.[9]

——**In fourth department.** Within fifteen days after the service of the printed papers required to be served by General Rule 41 in enumerated motions, the party whose duty it is to furnish those papers shall file with the clerk sixteen printed copies of the papers and sixteen printed copies of his brief and the points upon which he intends to rely upon the argument, with a reference to all the authorities, which he intends to cite to the court; and shall, at the same time, serve on the attorney or counsel for the other party three copies thereof. Within seven days thereafter the other party shall file with the clerk sixteen printed copies of his brief and points, with a reference to all his authorities, and serve on the attorney or counsel for the moving party three printed copies thereof. If either party shall fail to serve and file his brief and points, as herein required, he shall not be heard upon the argument, and judgment may be entered against him as upon default, on application to the court on any motion day upon three days' notice.

If the moving party desires to serve an answering brief he shall file with the clerk sixteen printed copies thereof, and serve upon his opponent three printed copies, within five days after the receipt of his opponent's brief. He shall not include, in his answering brief, any matter which is not in the nature of an answer to the brief to which it purports to reply.[10]

§ 2737. On non-enumerated motions.

Briefs must be delivered to the clerk and to the attorney for the adverse party at or before the commencement of the argument.

[9] Matter of Haase, 101 App. Div. 336, 91 N. Y. Supp. 373.

[10] Rule 9 of the Fourth Department which expressly states that it does not apply to appeals from nonenumerated motions.

§ 2738. Supplemental brief.

In the first department (rule 9) no brief or memorandum of authorities will be received by the court after the argument of a motion or an appeal, unless permission be given by the court for its submission, after notice to the opposing counsel of the application for such permission. In the fourth department (rule 9), no supplemental briefs are allowed unless requested by the court.

§ 2739. Indorsements.

In the second department, by rule 11, the counsel who argues the cause orally is required to indorse his name on the upper right hand corner of the first page of the brief. In the third (rule 10) and fourth (rule 11) departments, the counsel arguing the case must indorse on his brief delivered to the justices their names and place of residence.

§ 2740. Contents.

The points should be clear and concise. The facts should be stated briefly, eliminating all immaterial ones. The points should be numbered consecutively. Lengthy quotations from authorities, especially from New York cases, should not be inserted.

—— **Statement of facts.** In the third and fourth departments, the appellant, in addition to the statement required by rule 41 of the General Rules of Practice, shall prefix to his points a brief statement, showing in what court or before what officer or tribunal the action or proceeding was instituted, the relief sought, the defense or ground of opposition thereto, the result in the court or before the officer or tribunal in which the action or proceeding was commenced, and how the cause was brought into the appellate division. If any opinion written in the case has been previously reported, he shall also state where it was so reported. If any opinion has been written which has not been reported, the party whose duty it is to furnish the

papers shall submit a printed copy of such opinion to the court either in the record or with his brief.[11]

—— **Citation of statutes.** In the second department (rule 12), when a statute is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length in the brief.

—— **Citation of cases.** All cases cited in the briefs from the courts of this state shall be cited from the reports of the official reporters, if such cases shall have been reported in full in the official reports.[12]

—— **Effect of failure to discuss exceptions.** The fact that exceptions are not discussed in the brief of appellant does not prevent the court from basing a reversal thereon.[13]

[11] Rule 9 of the Third Department; Rule 10 of the Fourth Department.

[12] Rule 43 of General Rules of Practice.

[13] Purcell v. Hoffman House, 97 App. Div. 307, 89 N. Y. Supp. 975. However, points not urged will generally not be considered (Landers v. Staten Island R. Co., 13 Abb. Pr. [N. S.] 338, 348) though it has been held that they should be where raised by exception. Schoonmaker v. Wolford, 20 Hun, 166.

CHAPTER XII.

CALENDARS AND PROCEEDINGS PRELIMINARY TO HEARING.

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ART. I. IN COURT OF APPEALS.

§ 2741. New calendar.

A new calendar is not made at any fixed time but on or about the last day of any session at which it is apparent that not enough causes remain undisposed of to occupy the court for another session a new calendar is ordered to be made for the ensuing session and the time is fixed on or before which the returns and notices of argument for the new calendar must

be filed, and the date of the beginning of the session at which the new calendar will be taken up is set.[1]

When a new calendar is ordered by the court, the clerk shall place thereon all causes in which notices of argument, with proof or admission of service, have been filed in his office; and, also, if ordered by the court, all other causes in which the returns have been filed in his office, and the causes so put on the calendar by the direction of the court will be heard in their order as if regularly noticed.[2]

§ 2742. Notice of argument.

After the return is filed, but not before, either party may serve a notice of argument. The order for making a new calendar usually directs the time when the notice is to be served on the clerk.

To entitle an appeal "from an order" to be placed on the order calendar, a notice of argument for the first Monday of a session must be served at least eight days before the day named therein for the hearing, unless service is waived or short notice accepted, and must be filed with the clerk before two o'clock in the afternoon of the Friday next preceding the Monday named therein. The notice should so describe the appeal as to show that it is within the rule.[3]

If a preference on the calendar is sought, the claim therefor should be inserted in the notice of argument.[4]

Notes of issue are not used in the court of appeals.

—— Form of notice of argument.

[Title of cause.]

Please take notice that the appeal taken in the above-entitled action by ———, from the judgment (or "order") of the appellate division, ——— department, will be brought on for argument at the next term of the court of appeals, to be held at the capitol in the city of Albany, on the ——— day of ———, 190—, at the opening of the court on that

1 Smith, Ct. of App. Pr. 118.
2 Rule 19 of the court of appeals.
3 Smith, Ct. of App. Pr. 72b.
4 See post, § 2743.

day, or as soon thereafter as counsel can be heard, and will be moved as a preferred cause, on the ground that ———.

[Date.] [Signature and office address of appellant's attorney.]

[Address to clerk of court of appeals and to attorneys for respondents.]

§ 2743. Order of causes.

In the court of appeals cases are heard in the following order: (1) ex parte motions; (2) motions on notice; (3) appeals from orders and interlocutory judgments; (4) appeals on the general calendar.

"Motions, appeals from final orders in special proceedings, appeals from interlocutory judgments overruling or sustaining demurrers,[5] and appeals from orders in actions and special proceedings certified to the court of appeals by the appellate divisions, except orders granting a new trial, may be noticed for and will be heard on the first Monday of each session of the court, before taking up the calendar. Original motions may be submitted on any Monday."[6] No calendar of motions is made up, though the calendar of appeals from orders and interlocutory judgments is sometimes referred to as the "motion calendar." Such calendar contains appeals from orders according to the priority of filing returns, given consecutive numbers, following the last number on the general calendar. If the appeal is not reached on the motion day for which noticed and is not put over by stipulation, it retains its place and priority on the calendar for the first Monday of the next session, over all other causes, including those which may have been put over by stipulation on the former motion day.[7]

The causes are put on the general calendar in the order of the date of filing the returns, except where the cause is entitled to a preference. Preferred causes are arranged in the several classes according to the dates of the filing of the returns.[8]

[5] An appeal from any interlocutory judgment may be put on the motion calendar. Slater v. Slater, 174 N. Y. 264.

[6] Rule 11 of the court of appeals. The motions first specified include motions to dismiss appeals.

[7] Smith, Ct. of App. Pr. 72b, 73.

[8] Smith, Ct. of App. Pr. 119.

—— **Preferred causes.** No causes are entitled to any preference on the calendar except such as is given by law or the special order of the court.[9] There are twelve groups of cases entitled to preference in the order named in the Code. The right to a preference on the calendar, as provided for by the Code, has been treated of in a preceding volume.[10] These rules apply to the calendar of the court of appeals. Cases preferred by the General Rules of Practice of the supreme court are not entitled to preference in the court of appeals.[11]

Any party claiming a preference must so state in his notice of argument to the opposite party and the clerk; and he must also state the ground of such preference so as to show to which of the preferred classes the cause belongs.[12] The court will not add a case to the existing calendar, even though entitled to preference, unless some question of public importance is involved, or the circumstances are extraordinary.[13]

An order is necessary, in some cases, to obtain a preference.[14]

The motion for a preference, where necessary, may be made, on notice, before any judge of the court of appeals, at his residence or office or elsewhere.[15]

A preferred cause, where passed, loses it preference.[16]

—— **Exchange of causes on the calendar.** Causes upon the calendar may be exchanged one for another, of course, on filing with the clerk a note of the proposed exchange, with the numbers of the causes, signed by the respective attorneys or counsel. Upon all the subsequent calendars each of said causes will

[9] Rule 14 of the court of appeals.

[10] Volume 2, pp. 1674–1690. The Code provision giving a preference to appeals where a party has died pendente lite applies only where the deceased was a sole plaintiff or a sole defendant. Cotton v. New York El. R. Co., 151 N. Y. 266.

[11] Nichols v. Scranton Steel Co., 135 N. Y. 634, which holds, however, that a preference may be granted, in the discretion of the court, though not provided for by statute or rule of the court of appeals.

[12] Rule 14 of the court of appeals; Taylor v. Wing, 83 N. Y. 527.

[13] Goldberg v. Markowvitz, 179 N. Y. 596.

[14] When order is necessary, see vol. 2, p. 1682.

[15] Bank of Attica v. Nat. Bank, 91 N. Y. 239.

[16] Rule 14 of the court of appeals.

take the place due to the date of the filing of the return in the other.[17]

In like manner, a cause not upon the calendar in which an appeal to the court of appeals has been perfected and the return duly filed with the clerk, may be exchanged, of course, for another cause upon the calendar, on filing with the clerk a note of the proposed exchange, with the number of the cause on the calendar, and the date of filing return in the cause not upon the calendar, signed by the respective attorneys or counsel, and also a stipulation of the attorneys or counsel in the cause not on the calendar setting down the same for argument in place of the calendar cause when reached, with the same effect as if duly noticed. Upon all subsequent calendars, each of said causes will take the place due to the date of the filing the return in the other.[18]

—— **After cause is called and passed.** Any cause which is regularly called and passed, without postponement by the court for good cause shown at the time of the call, will be placed on all subsequent calendars as if the return had been filed on the day when it was so passed.[19] If a preferred cause is passed, it loses its preference.

—— **On second and subsequent appeals.** On a second and each subsequent appeal, including a case where a former appeal has been dismissed for a defect or irregularity, the time of filing the return, on the first appeal, determines the place of the cause on the calendar.[20]

§ 2744. Day calendar.

The first eight causes on the calendar constitute the first day calendar. Eight causes only will be called on any day,

[17] Rule 12 of the court of appeals. The exchange of causes provided for by this rule applies only to cases not yet placed on the day calendar. After being put on the day calendar, the place can be changed only by leave of court. Smith, Ct. of App. Pr. 75.

[18] Rule 12 of the court of appeals.

[19] Rule 12 of the court of appeals. When hearing of appeal will be postponed, see post, § 2754.

[20] Code Civ. Proc. § 195.

but after such call causes ready on both sides will be heard in their order.[21]

—— **Causes submitted.** Causes will not be received on submission until reached in the regular call of the calendar.[22] Causes, when reached on the day calendar, may be submitted without oral argument, by both parties or may be argued by one party and submitted by the other. If it is intended to submit, the clerk should be informed of the fact and the party who intends to submit must be sure that his points have been properly served and filed.[23]

—— **Causes reserved.** No reservation will be made of any of the first eight causes, unless on account of sickness, or an engagement elsewhere in the actual trial or argument of another cause commenced before the term of the court of appeals, or other inevitable necessity, to be shown by affidavit. Other causes may be reserved upon reasonable cause shown, or by stipulation of parties filed with the clerk, but no cause shall be so reserved by stipulation after the same has been placed upon the day calendar.[24]

Causes reserved for a day certain by stipulation, when in order to be called, have priority among each other according to the time of filing the stipulations with the clerk, and shall follow next in order the undisposed of causes of the calendar for the day previous. Default may be taken in them, and they will, if passed, go down upon future calendars as if passed in the regular call.[25]

No reserved cause, whether reserved generally or for a particular day, will be called before its number is reached on the regular call of the calendar.[26]

By stipulating to set a cause down for a day certain, parties insure that the cause will not be put on the day calendar before the day named. After the day calendar is made up, a stipulation of reservation thereafter received is of no effect ex-

[21] Rule 12 of the court of appeals.
[22] Rule 10 of the court of appeals.
[23] Smith, Ct. of App. Pr. 66.
[24-26] Rule 10 of the court of appeals.

cept that if the cause is not reached on that day it may be left off, on making up the next day's calendar, and go over for the day named in the stipulation. If the court is not in session on the day for which the case is stipulated, it will be put on the next day calendar thereafter. When a new general calendar is made up, new stipulations must be filed.[27]

ART. II. IN APPELLATE DIVISION.

§ 2745. Rules which govern.

The General Rules of Practice have little to say regarding calendar practice in the appellate division, it being left to each department to make its own rules. The rules fixed by the different departments are largely the same though they differ to some extent.

§ 2746. Filing of papers as condition.

No case shall be put on the enumerated or non-enumerated calendar until the papers required by General Rule 41 have been filed with the clerk.

§ 2747. Notes of issue.

Notes of issue for the appellate division shall be filed eight days before the commencement of the court at which the cause may be noticed.[28]

In the second (rule 7), third (rule 1) and fourth (rule 1) departments, the attorney or party intending to move an appeal for argument on the non-enumerated calendar, shall, at least eight days before the time of the making up of the calendar, file with the clerk a note of issue, specifying the date of the service of the notice of appeal, and stating that the case is to be put on the non-enumerated calendar. On appeals from orders noticed for argument on a motion day, the appellant or moving party must, in the first department, file with the clerk

[27] Smith, Ct. of App. Pr. 67.
[28] Rule 39 of General Rules of Practice.

of the appellate division at least eight days before the day upon which such appeal shall have been noticed, a note of issue which shall state the date of service of the notice of appeal.

In the first department (rule 1), a note of issue on a motion, stating the nature of the motion and the day for which it has been noticed must be filed with the clerk before noon on the Thursday preceding the Friday for which the motion is noticed. In the second department (rule 6), motions, other than appeals from orders, will be heard on the first and third Mondays of the term, and notes of issue therefor must be filed with the clerk at least two days before the day for which they are noticed.

The department rules provide that a party who desires to have a case heard as a preferred case must, in his note of issue, state his claim for preference as provided for in section 793 of the Code; or if an order giving the case a preference has been made under that section, the note of issue must be accompanied with a copy of such order.[29]

§ 2748. Order of causes.

Appeals shall be placed on the calendar, according to the date of the service of the notice of appeal; and all subsequent enumerated appeals in the same cause shall be put on the calendar as of the date of the first appeal; and other cases as of the time when the question to be reviewed arose. Appeals in non-enumerated motions shall also be placed on a separate calendar. Cases entitled to preference shall be placed separately on the calendar.[30]

In the first department, the clerk makes up a calendar of enumerated cases for each term of the court, which consists of the enumerated cases upon the calendar of the preceding term undisposed of, and which shall not have been passed twice upon any of the previous calendars of the court, to which is added new cases noticed for argument.

[29] The last clause is applicable to all the departments other than the first in which no provision is made therefor.

[30] Rule 39 of General Rules of Practice.

In that department a motion day calendar is made up, consisting of all motions noticed to be heard on that day. No motion not on such calendar can be heard. All ex parte applications must be made on motion days except by special permission of the court. Appeals from orders are heard only on motion days (Fridays), the calendar of which is taken up immediately after the disposition of the motion calendar.

In the second department, appeals from orders, heard as non-enumerated motions, are placed upon a separate calendar and called the first day of the term.

In the third and fourth departments, if all non-enumerated motions and appeals from orders which are ready for hearing on the first day of the term are not heard upon that day, the hearing of them is continued from day to day until they are all disposed of, before the general calendar is taken up, unless otherwise ordered by the court.

—— **Preferred causes.** The clerk must place the preferred causes at the head of the general calendar, indicating that they are preferred, and the class to which they belong.

—— **Passed causes.** In the second department, an appeal passed during any term may be brought on for argument on any day during a subsequent term upon stipulation, or upon four days' notice to the opposing party, and on filing with the clerk such stipulation or proof of service of such notice, the clerk will cause the appeal to be placed on the day calendar of the day named in such notice or stipulation.

In the third department (rule 13), if a cause is passed without being reserved, or put over by consent of the court, it shall be entered on all subsequent calendars as of the date when passed, and the party placing it on the calendar for a subsequent term must state in his note of issue the date when it was passed. If he omits to do so, whereby the cause retains its priority on the calendar, the court, on the application of the adverse party, or on its own motion, may strike the cause from the calendar.

In the fourth department, if a case shall have been passed it shall go upon the calendar as of the time when it was passed,

and the fact that it was passed shall be stated upon the calendar.

§ 2749. Day calendar.

The day calendar in the fourth department (rule 5), is prepared at 3 p. m. of the preceding day and consists of ten cases, or such other number as the court directs, including those undisposed of on the then day calendar. Cases not disposed of on any day are to be placed at the head of the next day calendar until disposed of. In the third department (rule 5), the day calendar consists of such number of causes as the court directs. In the second department (rule 4) the day calendar for the first and third Mondays of the term consists of non-enumerated causes only, and the hearing of such causes continues from day to day until completed. For other days it consists of twelve causes, placed thereon from the general calendar in their numerical order. In the first department (rule 6), the clerk makes up each day a calendar of fifteen enumerated cases for the next day.

In fourth (rule 6) department, no case shall be put upon the day calendar, unless it has been reserved for that day by stipulation filed with the clerk, or unless written notice is served upon the clerk at or after the commencement of the term, by the attorney on one side or the other, that such a case is intended to be moved when called in its regular order, and any case not placed on the day calendar in its order on the general calendar, will be regarded as passed for the term unless reserved or put over with the consent of the court. The same rule prevails in the third department (rule 6) except as to the first twenty causes on the general calendar which cannot be reserved by stipulation without consent of the court, on application made on the first day of the term.

§ 2750. Exchange of cases.

In the third and fourth departments, no exchange of cases will be allowed unless both cases are ready for argument, and counsel intend to argue them at the same term at which the

exchange is made; and when cases are exchanged, each shall occupy the proper position of the other in date, on the same and every subsequent calendar, until heard. A preferred case, exchanged for one not preferred, or set down for a particular day, shall lose its preference, and no case will be called more than once during the same term, unless it shall have been reserved or postponed with consent of the court.

§ 2751. Reservation of causes.

In the fourth department (rule 8), no reservation will be made of any of the first eight cases upon the general calendar, unless on account of sickness, or an engagement of counsel elsewhere in the actual trial or argument of another case in a court of record, commenced before the term of court, or other inevitable necessity to be shown by affidavit. Other cases may be reserved upon reasonable cause shown, or by stipulation of parties, filed with the clerk, but no case shall be so reserved by stipulation after the same has been placed upon the day calendar. Cases reserved for a day certain by stipulation, when in order to be called, have priority among each other according to their number on the calendar, and shall follow next in order the undisposed of cases on the calendar for the day previous. Default may be taken in them, and they will, if passed, be put upon future calendars as if passed in the regular call.

In the third department (rule 6) the first twenty causes on the general calendar cannot be reserved by stipulation except by consent of the court, on application made on the first day of the term.

In the second department, causes can be reserved by consent for a day subsequent to the time when they would be reached in their order only when a stipulation to that effect is filed with the clerk before the day calendar is made up (one o'clock p. m.)

In the first department, at any time after the filing of a note of issue in an enumerated cause, and before it shall have been placed on the day calendar, a written consent, signed by the

attorneys or counsel who are to argue the case, that the appeal be set down for any future day of the term prior to the third Thursday thereof, may be filed with the clerk, and such case shall be placed on the day calendar for such day at the end of the cases remaining thereon undisposed of in the order in which they have been set down, provided that no more than fifteen cases shall be placed on any day calendar and provided that such cases would have been reached on the general calendar if not set down. At any time before three o'clock of the day preceding the day upon which a "non-enumerated" case shall have been noticed for argument, or to which the hearing thereof shall have been adjourned, the respective parties may file a written consent with the clerk that the case may be set down for a subsequent motion day; and cases set down will be added to the calendar of that day at the foot of the cases remaining thereon undisposed of without further notice.

An enumerated case on the day calendar, in the first department (rule 6) will not be reserved or postponed except by order of the court on special cause shown.

CHAPTER XIII.

HEARING.

Where, and by whom, heard, § 2752.
—— In appellate division.
Time for hearing, § 2753.
Postponement of hearing, § 2754.
Submission without argument, § 2755.
Argument, § 2756.
—— In appellate division.
Motions, § 2757.
—— In appellate division.

§ 2752. Where, and by whom, heard.

In the court of appeals, every cause shall be deemed to be submitted to such judges as may be absent at the time of argument, unless objection to such submission by counsel arguing the cause be then made.[1]

—— **In appellate division.** An appeal taken to the appellate division of the supreme court must be heard in the department, embracing the county, in which the judgment or order appealed from is entered, unless an order is made, as prescribed in section 231 of the Code, directing that it be heard in another department, or unless appeals pending in one department are transferred for hearing and determination to another, pursuant to article six, section two,[2] of the Constitution.[3]

An appeal to the supreme court must be heard by the appellate division of the supreme court, except that (1) appeals from the judgment of any municipal court in either of the boroughs of Manhattan or the Bronx in the city of New York or

[1] Rule 8 of the court of appeals.

[2] The Code refers to section one but this is evidently a mistake and section two is meant.

[3] Code Civ. Proc. § 1355.

from a judgment or order of the city court in the city of New York, may be heard by the appellate division of the supreme court, or by such justice or justices of the supreme court as may be designated for that purpose by the justices of the appellate division sitting in the first judicial department; and except that (2) appeals from inferior courts formerly heard by the superior court of Buffalo, now abolished, shall be heard by the appellate division in the fourth judicial department or by such justice or justices of the supreme court as may be designated for that purpose by the justices of the appellate division of the fourth judicial department.[4]

§ 2753. Time for hearing.

In the court of appeals, motions and appeals from orders are heard on the first day of the term.

Non-enumerated motions in the appellate division and appeals from orders will be heard on the first day of each term and on the Friday of each subsequent week immediately after the opening of court on those days,[5] except where the appellate division in any department, by special rule, assigns other days for such hearing.[6]

§ 2754. Postponement of hearing.

A postponement of the argument will be permitted to allow an application to the lower court for an amendment of the record,[7] or to apply to substitute a person as a party in place

[4] Code Civ. Proc. § 1344.

[5] Rule 44 of General Rules of Practice.

[6] First department—first, second and third Fridays of each term and days designated in July, August and September. Second department—first and third Mondays of term. Third and fourth departments—first day of term and each succeeding Friday but causes not reached on first day will be disposed of before taking up the general calendar.

[7] Rice v. Isham, 1 Keyes, 44; Westcott v. Thompson, 16 N. Y. 613. Postponement only in exceptional cases. Queen v. Weaver, 166 N. Y. 398.

[8] Shaler & Hall Quarry Co. v. Brewster, 32 N. Y. 472.

of a deceased party,[8] but not, where the case is on the day calendar, merely for the convenience of counsel.[9]

§ 2755. Submission without argument.

Both in the court of appeals and in the appellate division, one or both of the parties may submit the cause without argument, after delivering the necessary papers and points, but no advantage on the calendar can be gained thereby. In the first and third departments of the appellate division, if both parties desire to submit, they may do so at any time during the term by delivering to the clerk the cases and points required by General Rule 43, and either party may submit his points when the case is called, if the other party desires to argue orally on his part. So, in the first department, appeals from orders which have been placed upon the calendar may be submitted by the parties, with the approbation of the court, at any time during the term, upon delivering to and leaving with the clerk the requisite number of printed copies of the points.

§ 2756. Argument.

In the court of appeals, in the argument of a cause, not more than two hours shall be occupied by counsel on either side, except by the express permission of the court. In the argument of an appeal from an order not more than twenty minutes shall be occupied by the appellant's counsel, nor more than fifteen minutes by the respondent's counsel, without express permission of the court.[10]

——**In appellate division.** The General Rules of Practice provide that at the hearing of causes in the appellate division, unless the court shall otherwise order, not more than one counsel shall be heard on each side, and not for more than an hour each, or thirty minutes each on appeals from orders and

[9] Bank of Salina v. Alvord, 32 N. Y. 684. Engagements of counsel no ground. Starr v. Benedict, 19 Johns. 455; Tyron v. Jennings, 12 Abb. Pr. 33, 22 How. Pr. 421.

[10] Rule 13 of the court of appeals.

on non-enumerated motions.[11] In the first department (rule 3), only fifteen minutes is allowed each side on an appeal from an order. In the third department (rule 12), on appeals from judgments in negligence actions, the argument of counsel is limited to one-half hour for each party.

§ 2757. Motions.

Motions in the court of appeals should be on eight days' notice unless an order to show cause is obtained or unless notice is waived or short notice accepted. Motion papers need not be printed, except on a motion for a reargument, nor need they be filed unless they are to be submitted without oral argument in which case they should be sent to the clerk on or before the Saturday preceding the motion day for which noticed. Counsel will be heard briefly except on motions for reargument which must be submitted.[12]

Where, in the court of appeals, notice has been given of a motion, if no one shall appear to oppose, it will be granted as of course. If a motion be not made on the day for which it has been noticed, the opposing party will be entitled, on applying to the court at the close of the motions for that day, to a rule denying the motion with costs.[13]

—— **In appellate division.** If a non-enumerated motion noticed to be heard at the appellate division shall not be made upon the day for which it is noticed, the party attending pursuant to notice to oppose the same may, at the close of that order of business, unless the court shall otherwise order, take a rule against the party giving the notice, denying the motion, with costs.[14]

[11] Rule 47 of General Rules of Practice.
[12] Smith, Ct. of App. Pr. 72b.
[13] Rule 11 of the court of appeals.
[14] Rule 44 of General Rules of Practice.

CHAPTER XIV.

REHEARING.

General considerations, § 2758.
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Who may move, § 2760.
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Briefs, § 2763.
Copy of opinion, § 2764.
Delivering papers to clerk, § 2765.
Hearing of motion, § 2766.
—— Argument.
—— Discretion of court.

§ 2758. General considerations.

Applications for reargument are not looked on with favor,[1] especially where sought in a court other than a court of last resort. A rehearing may be denied by the appellate division though it might be granted if the case was in the court of appeals, though ordinarily the rules as to when a reargument will be granted are the same in both courts.[2] It would seem that the appellate division should more readily grant a rehearing in a case not appealable as of right to the court of appeals.

§ 2759. Grounds.

The recognized grounds for reargument of a case are rarely departed from though the court of appeals has reexamined the case because of its extraordinary importance though no recog-

[1] Trinity Church v. Higgins, 27 Super. Ct. (4 Rob.) 372.

[2] That court other than court of appeals should allow reargument only in extraordinary cases, see Newell v. Wheeler, 27 Super. Ct. (4 Rob.) 190, 194. On denying motion for reargument, the order may be

nized ground for a reargument existed.[3] The general rule [4] is that a reargument will not be granted unless it is shown either that (1) some question decisive of the case and duly submitted by counsel was overlooked;[5] or (2) the decision is in conflict with an express statute;[6] (3) a controlling decision [7] to which the court's attention was not called; or (4) a court of higher resort has decided the precise question adversely since the decision.[8]

A reargument will be ordered in the appellate division where the decision is based on a decided point of law in a case which has thereafter been reversed as to such rule of law by

amended, as by granting a new trial instead of dismissing the complaint. Giles v. Austin, 34 Super. Ct. (2 J. & S.) 540, 545.

[3] See O'Brien v. City of New York, 142 N. Y. 671.

[4] Fosdick v. Town of Hempstead, 126 N. Y. 651; Banks v. Carter, 7 Daly, 417; Hand v. Rogers, 16 Misc. 364, 38 N. Y. Supp. 2.

[5] Irvine v. F. H. Palmer Mfg. Co., 2 App. Div. 385, 39 N. Y. Supp. 245. But a reargument will not be granted because an important point was not considered unless it shall clearly appear, as an undisputed fact, that it was not considered, and that it presents a fair question for discussion. If the decision necessarily involves the point, a reargument will not be granted. Guidet v. City of New York, 37 Super. Ct. (5 J. & S.) 124. It cannot be assumed that any particular point has been overlooked because not discussed in the opinion. Ernst v. Estey Wire Works Co., 21 Misc. 68, 46 N. Y. Supp. 918; Chatterton v. Chatterton, 34 App. Div. 245, 54 N. Y. Supp. 515; Edgerley v. Long Island R. Co., 46 App. Div. 284, 61 N. Y. Supp. 677.

[6] This is not ground, however, where the statute was not urged as controlling either at the trial or on the argument, because neither court nor counsel knew of its existence. Walsh v. Brown, 24 State Rep. 722, 6 N. Y. Supp. 97.

[7] Coleman v. Livingston, 36 Super. Ct. (4 J. & S.) 231; Myers v. Dean, 10 Misc. 402, 31 N. Y. Supp. 119. Decision must be one clearly in point. Heywood v. Thacher, 47 State Rep. 316, 19 N. Y. Supp. 882. Dicta not sufficient. Van Rensselaer v. Wright, 34 State Rep. 438, 12 N. Y. Supp. 330.

[8] Hand v. Rogers, 16 Misc. 364, 38 N. Y. Supp. 2; Taylor v. Grant, 36 Super. Ct. (4 J. & S.) 259. The appellate division must overrule its decision where the court of appeals has, in the interim, decided the point the other way. Walsh v. Hanan, 93 App. Div. 580, 87 N. Y. Supp. 930.

the court of appeals.[9] The reversal of a case involving the same questions, by the court of appeals, without opinion is ordinarily not ground, but a reargument will be granted in such a case where it was stipulated that the action at bar was in effect to be governed by the appealed action.[10]

The following have been held not grounds for reargument: That judges, in their consultation, were equally divided in their opinion;[11] that counsel was not fully prepared to argue the appeal;[12] that, as counsel believes, the court did not fully understand the questions;[13] that the cause was submitted instead of being argued orally;[14] omission of the appellant to present on the argument a point appearing in the case;[15] death of plaintiff when appeal was argued and decided;[16] facts not appearing in the record;[17] that court overlooked authorities and erred in supposing that it could render a decree under the particular form of the pleadings.[18]

A reargument will not be granted by the court of appeals after the order of reversal by the appellate division is amended so as to show that the reversal was on the facts.[19]

A rehearing will not be granted where no advantage could result from it,[20] nor to allow an attack on the correctness of

[9] Freeman v. Falconer, 44 Super. Ct. (12 J. & S.) 579. This rule does not apply where an authority cited on an incidental matter is reversed. Matter of Evans' Will, 65 App. Div. 610, 72 N. Y. Supp. 493.

[10] Butterfield v. Radde, 40 Super. Ct. (8 J. & S.) 169.

[11] Mason v. Jones, 3 N. Y. (3 Comst.) 375.

[12, 13] Drucker v. Patterson, 2 Hilt. 135.

[14] Weldon v. De Lisle, 8 App. Div. 610, 41 N. Y. Supp. 1134.

[15] The ordinary rule is that an exception not raised on the argument is deemed abandoned. Rogers v. Laytin, 80 N. Y. 637. Jones v. Brinsmade, 93 N. Y. Supp. 674.

[16] Blake v. Griswold, 4 State Rep. 285.

[17] Heywood v. Thacher, 47 State Rep. 316, 19 N. Y. Supp. 882. Reargument will not be ordered to dispose of a question not disclosed by the record. Nelson v. Hatch, 57 App. Div. 572, 68 N. Y. Supp. 501.

[18] Trinity Church v. Higgins, 27 Super. Ct. (4 Rob.) 372.

[19] Cudahy v. Rhinehart, 133 N. Y. 675.

[20] Teaz v. Chrystie, 2 E. D. Smith, 635, 2 Abb. Pr. 259. Reargument in court of appeals to present point not argued originally will not be granted where there was no exception raising the point in the original

a former decision,[21] nor to correct an error in the reasoning of the court as expressed in the opinion, when it is admitted that the decision itself is correct.[22]

A motion for a reargument as to a particular point has been denied where a new trial had been ordered so that the question could be specifically raised in the lower court, and, if decided adversely to appellants, be reviewed on a second appeal.[23]

§ 2760. Who may move.

It would seem that only a party to the record can apply for a rehearing. A motion for a reargument made by one appellant cannot be treated as an application in behalf of all, unless it affirmatively appears that it is made on their behalf, and hence the motion will not be granted if the applicant is not entitled thereto notwithstanding that the other appellants might be entitled thereto.[24]

§ 2761. Time for motion.

The court of appeals holds that a reargument will not be ordered where the jurisdiction of the cause has become vested in the court below, as where the remittitur has been sent down and not returned. After the remittitur has been filed in the court below, and the usual order entered thereon, it must be returned by the direction of the lower court, before the court of appeals can grant a reargument.[25]

If it is intended to move for a reargument in the court of appeals, a stipulation should be obtained from the other side,

record. Hunt v. Church, 73 N. Y. 615. Motion for reargument denied where the errors complained of had not been specifically pointed out in the notice of motion on which the order appealed from was granted. Oliver v. French, 65 State Rep. 720, 32 N. Y. Supp. 576.

[21] McGarry v. New York County Sup'rs, 31 Super. Ct. (1 Sweeny) 217.

[22] Matter of Lyman, 161 N. Y. 119.

[23] People v. Ballard, 136 N. Y. 639.

[24] McCreery v. Ghormley, 9 App. Div. 221, 41 N. Y. Supp. 167.

[25] Wilmerdings v. Fowler, 15 Abb. Pr. (N. S.) 86; Franklin Bank Note Co. v. Mackey, 158 N. Y. 683.

or an order from one of the judges, staying the remittitur, in case it has not gone down, or staying proceedings thereon in case it has gone down but not been acted on. If the remittitur has been filed and action taken thereon in the court below, a preliminary application should be made to the court of appeals for an order requesting the court below to return the remittitur, or else such application should be inserted in the moving papers for a reargument, and the court should be asked therein to request the return of the remittitur and thereupon grant a reargument.[26]

The appellate division will not grant a motion for a reargument where the defeated party has allowed his time to appeal to the court of appeals to expire,[27] nor after an appeal has been taken to the court of appeals.[28]

The fact that judgment has been entered in the appellate court does not preclude the right to hear a reargument.[29]

§ 2762. Motion papers.

A motion for reargument must be founded on papers showing that some question decisive of the case and duly submitted by counsel has been overlooked by the court, or that the decision is in conflict with a statute, or with a controlling decision to which the attention of the court was not directed through the neglect or inadvertence of counsel.[30] The motion papers should enable the court to determine whether the decision requires correction in any respect; and where the de-

[26] Smith, Ct. of App. Pr. 124.

[27] Cuykendall v. Douglass, 17 Wkly. Dig. 315.

[28] Matter of Citizens' Water Works Co., 60 Hun, 585, 39 State Rep. 747, 15 N. Y. Supp. 579; Jung v. Keuffel, 12 Misc. 89, 32 N. Y. Supp. 1136.

[29] St. Michael's Protestant Episcopal Church v. Behrens, 10 Civ. Proc. R. (Browne) 181.

[30] Fosdick v. Town of Hempstead, 126 N. Y. 651, following Mount v. Mitchell, 32 N. Y. 702; Marine Nat. Bank v. National City Bank, 59 N. Y. 67; Auburn City Nat. Bank v. Hunsiker, 72 N. Y. 252. The matters overlooked must be specified. Von Wagoner v. Royce, 66 Hun, 631, 21 N. Y. Supp. 191.

cision was upon a dissenting opinion in the court below, the case on appeal containing the opinion of the lower court should be furnished.[31] The jurisdiction of the court of appeals being confined to a review of determinations actually made by the supreme court, which must be had on the same papers which were before the appellate division, the court cannot permit a reargument upon papers showing proceedings instituted to amend defects in the original proceedings since the determinations sought to be reviewed.[32]

—— **Notice of motion.** A motion for reargument will only be heard on notice to the adverse party, stating briefly the ground on which a reargument is asked [33]

In the first department motions for reargument must be noticed for the term succeeding that on which the appeal was decided.[34]

Motions for reargument should be noticed for a motion day.

The motion in the appellate division is sometimes made in the alternative for a reargument or for leave to appeal to the court of appeals.[35]

§ 2763. Briefs.

Motions for reargument must be submitted on printed briefs, stating concisely the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the case, and the authorities relied upon.[36]

[31] Anderson v. Continental Ins. Co., 106 N. Y. 661. See, also, post, note 37.

[32] Matter of New York Cable Co., 104 N. Y. 1. Rehearing may be granted by appellate division. Id.

[33] Rule 20 of the court of appeals; Rules 8 (first dept.), 11 (second and third depts.), 14 (fourth dept.) of department rules of the appellate division.

[34] Rule 8 of the first department of appellate division.

[35] See Roeber v. New Yorker Staats Zeitung, 2 App. Div. 163, 37 N. Y. Supp. 719.

[36] Rule 20 of the court of appeals. Rule 8 of first department of appellate division; rule 11 of second department; rule 11 of third department; rule 14 of fourth department.

§ 2764. Copy of opinion.

In the appellate division a copy of the opinion of the appellate division must be submitted together with the briefs.[37]

§ 2765. Delivering papers to clerk.

The original motion papers and notice, with proof or admission of service, and the necessary copies of the printed points on each side of the motion, should be delivered to the clerk on or before the opening of the court on the day named in the notice.

§ 2766. Hearing of motion.

The court cannot go outside the record or consider material facts for the first time brought to its notice on the motion for reargument.[38] And the court cannot allow the appellant to amend his case and hear the reargument on such amended case, since any rehearing must be on the same record.[39]

—— **Argument.** Counsel will not be heard orally either in the court of appeals or in the appellate division.[40]

—— **Discretion of court.** The motion for a reargument is addressed to the discretion of the court.[41]

[37] Rule 8 of first department of appellate division; rule 11 of second and third departments; rule 14 of fourth department. In first department a printed copy is required. Rule 8 of rules of first department.

[38] People ex rel. Dady v. Thirty-First Ward Sup'r, 91 Hun, 206, 36 N. Y. Supp. 348.

[39] Wright v. Terry, 24 Hun, 228.

[40] Rule 20 of the court of appeals; Rules 8 (first dept.), 11 (second and third depts.), 13 (fourth dept.) of department rules of appellate division.

[41] Holmes v. Rogers, 18 State Rep. 652, 2 N. Y. Supp. 501; Hooper v. Beecher, 109 N. Y. 609.

CHAPTER XV.

DISMISSAL OR WITHDRAWAL OF APPEAL.

Dismissal by consent, § 2767.
Dismissal on motion of appellant, § 2768.
Nature and propriety of motion by respondent, § 2769.
Grounds for dismissal, § 2770.
—— Failure to give undertaking.
—— Failure to prosecute proceedings.
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—— Failure to make, serve, or file case.
—— Failure to substitute person as party or attorney.
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Waiver of right to move, § 2771.
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—— Court in which motion to be made.
—— Motion papers.
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Hearing, § 2773.
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Effect of dismissal, § 2775.
Reinstatement, § 2776.

§ 2767. Dismissal by consent.

In the court of appeals, an appeal may be dismissed by consent at any time, by filing with the clerk a stipulation to that effect, signed by the respective attorneys for the several parties, and stating whether the dismissal is to be with or without costs. On the receipt of such stipulation, the clerk drafts and enters the proper order, and, if a return has been filed, makes up a remittitur, which, with a certified copy of the order, is transmitted as may be directed by the stipulation.

If the stipulation contains no direction on the subject, the papers are sent to the respondent's attorney, if he so requests; if not, they are sent to the appellant's attorney. If no return has been filed, only a certified copy of the order is sent down.[1]

An appeal to the appellate division may also be dismissed by consent evidenced by a stipulation signed by the attorneys for all parties to the appeal.

§ 2768. Dismissal on motion of appellant.

It sometimes happens that the appellant desires to withdraw his appeal after it is perfected. This often occurs where he has appealed to the court of appeals and given a stipulation for judgment absolute but afterwards wishes to be relieved from such stipulation and have a new trial in the lower court. The appellant cannot withdraw the appeal, at his pleasure, unless the other parties to the appeal consent, but must obtain an order from the appellate court,[2] permitting him to withdraw his appeal. An appeal is not discontinued by the mere service of a notice of withdrawal and tender of costs, but an order of court is necessary.[3]

Where a party has in good faith appealed from an order granting a new trial and given a stipulation for judgment absolute but he discovers his mistake in appealing before the argument, he will ordinarily be allowed to withdraw his appeal, on payment of costs,[4] especially where the appeal was a nullity because no final judgment had been entered;[5] but leave to withdraw the appeal will not be granted where several years have elapsed since the reversal unless the merits of the appeal are clearly shown.[6] Where a stipulation for judgment abso-

[1] Smith, Ct. of App. Pr. 89.

[2] Court from which appeal is taken cannot grant order. Powell v. Schenck, 6 App. Div. 130, 39 N. Y. Supp. 877.

[3] Weinman v. Dilger, 46 Super. Ct. (14 J. & S.) 101; Burnett v. Harkness, 4 How. Pr. 158, 2 Code R. 100.

[4] Mackay v. Lewis, 73 N. Y. 382; Brown v. Simmons, 14 Daly, 456.

[5] Vernon v. Palmer, 5 Civ. Proc. R. (Browne) 233, 67 How. Pr. 18, 48 Super. Ct. (16 J. & S.) 233.

[6] Post v. Hathorn, 54 N. Y. 147, 152.

lute has been given, the court of appeals may allow appellant to withdraw the appeal, where the appeal brings up no question for review, though the motion is not made until the argument is pending.[7]

Where the order of reversal is amended by the appellate division so as to show that the reversal was both on questions of law and questions of fact, leave to withdraw the appeal, on terms, has been granted by the court of appeals.[8]

After a settlement of the cause, without notice to the judgment creditor's attorney, an appeal will not be allowed to be withdrawn, where it will affect his rights,[9] unless he has ceased to represent the appellant.[10]

The order, when granted, is usually conditioned on the payment of the accrued costs and the costs of the motion.[11] Where an appeal is taken instead of moving for a new trial, the appellate division may correct the practice by ordering appellant to stipulate to withdraw the notice of appeal and substitute a motion for a new trial and pay the costs of the appeal.[12]

§ 2769. Nature and propriety of motion by respondent.

A motion to dismiss an appeal in effect requests the appellate court to refuse to examine the merits of the cause. It is only where time may be gained and the appeal be disposed of before the case in chief can be presented that a special motion to dismiss the appeal should be deemed available to the respondent.[13] Where the appeal is effective for any purpose it should not be dismissed.[14]

[7] Williams v. Delaware, L. & W. R. Co., 127 N. Y. 643, which reviews the prior decisions.

[8] Lawlor v. Magnolia Metal Co., 158 N. Y. 743. Terms imposed were payment of all costs and disbursements accrued on the appeal to the court of appeals.

[9] Stilwell v. Armstrong, 28 Misc. 546, 59 N. Y. Supp. 671.

[10] Holy Trinity Church v. Church of St. Stephen, 128 N. Y. 604.

[11] An order dismissing the appeal is not sufficient until payment of the respondent's costs. Burnett v. Harkness, 4 How. Pr. 158, 2 Code R. 100.

[12] Douglas v. Douglas, 5 Hun, 140.

§ 2770. Grounds for dismissal.

The grounds for dismissal consist of facts which go to show that for some reason the merits of the appeal should not be heard.

The appeal may be dismissed because of failure to appeal within the statutory time,[15] or because the appellant is not a person "aggrieved" by the judgment or order appealed from so as to be entitled to appeal,[16] or because the appeal was in violation of an agreement between the parties,[17] or because of the failure to join as respondents persons who are adverse parties,[18] or because of the taking of an appeal from the order directing judgment instead of from the judgment,[19] or because of a repeal of the statute authorizing the appeal, pending the appeal;[20] but a violation by appellant of a stipulation by which he obtained a stay of proceedings is not ground.[21]

The taking of inconsistent steps after perfecting an appeal may warrant a dismissal of the appeal where such acts, if done before appealing, would have precluded or waived the right to appeal.[22] For instance, the appeal from a denial of a motion should be dismissed where the denial was with leave to re-

[13] Bryant v. Thompson, 36 State Rep. 921, 14 N. Y. Supp. 386.

[14] Seymour v. Spring Forest Cemetery Ass'n, 4 App. Div. 359, 38 N. Y. Supp. 726.

[15] See ante, § 2601. If both the judgment and the order denying a new trial are appealed from, the appeal from the judgment may be dismissed for failure to perfect it in time, and the appeal from the order be heard alone. Iaquinto v. Bauer, 104 App. Div. 56, 93 N. Y. Supp. 388.

[16] Matter of Watson v. Nelson, 69 N. Y. 536, 538. Appeal should be dismissed only in a clear case. Bryant v. Thompson, 36 State Rep. 921, 14 N. Y. Supp. 386.

[17] People v. Stephens, 52 N. Y. 306.

[18] The objection is waived by failure to make the motion. Douglas v. Yost, 64 Hun, 155, 18 N. Y. Supp. 830.

[19] Error can be availed of only by motion to dismiss. Klots v. Fincke, 2 T. & C. 580.

[20] Gale v. Wells, 7 How. Pr. 191.

[21] Baker v. Stephens, 10 Abb Pr. (N. S.) 1.

[22] See ante, §§ 2574–2590.

new and the appellant has renewed the motion.[23] However, the fact that a party obtains leave to interpose the judgment appealed from as a bar to another action does not require a dismissal of the appeal.[24]

The question whether the defect in the order appealed from has been waived by appellant by acts since the taking of the appeal can be urged only on a motion to dismiss.[25]

An appeal to the court of appeals from an order granting a new trial will be dismissed where a stipulation for judgment absolute is not given.[26]

Where the party in interest notifies its attorney to stop proceedings, the appeal should be dismissed, though the attorney objects.[27]

—— **Failure to give undertaking.** Inasmuch as an undertaking is necessary to perfect an appeal to the court of appeals, it would seem that the failure to serve and file one within the time allowed for perfecting the appeal should be ground for dismissal,[28] though there is merit in the contention that in the absence of an undertaking there is no appeal and hence that there is nothing to dismiss.[29] Where a new undertaking is ordered in the court of appeals because one or more of the sureties have become insolvent, the failure to file and serve a new undertaking is ground for dismissal.[30] So where sureties are excepted to and fail to justify, and no new undertaking is given, the appeal may be dismissed by the court of appeals.[31]

[23] Apsley v. Wood, 67 How. Pr. 406; Harrison v. Neher, 9 Hun, 127.

[24] Brewster v. Wooster, 56 State Rep. 844, 26 N. Y. Supp. 912.

[25] Woodruff v. Austin, 15 Misc. 450, 37 N. Y. Supp. 22.

[26] See ante, § 2539.

[27] Saratoga Gas & Elec. Light Co. v. Town, 67 Hun, 645, 51 State Rep. 229, 22 N. Y. Supp. 343.

[28] Reese v. Boese, 92 N. Y. 632.

[29] Benedict & B. Mfg. Co. v. Thayer, 82 N. Y. 610.

[30] See ante, § 2678. Rule does not apply to appeals to appellate division.

[31] See ante, § 2677. Rule does not apply to appeals to appellate division.

—— **Failure to prosecute proceedings.** In the court of appeals an appeal may be dismissed, without application to the court, where appellant fails to file the return within ten days after notice in writing to do so,[32] or where he fails to serve three printed copies of the case on the attorney for respondent within ten days after notice.[33] So a failure to appear in the court of appeals when the cause is called for argument is ground.[34]

In the appellate division, the appeal will be dismissed, without application to the court, where the case is twice passed on the calendar after neither party appears.[35] So the failure to file and serve printed papers, as required by rule 41 of the General Rules of Practice, is ground.[36] Where appellant neglects to serve on respondent the papers on which the appeal is to be heard, after the entry of an order declaring the case and exceptions waived or abandoned, the respondent may move that the cause be struck from the calendar and judgment rendered in his favor.[37] A default in filing and serving printed papers may, however, be opened, on terms.[38]

—— **Omissions in the record.** Where the record fails to present any question for review, the appeal will be dismissed,[39] but the appeal will not be dismissed because of the absence of papers from the appeal book where the certificate of the clerk shows that they were not filed,[40] nor because part of the papers on which the order below was made are not embraced in the return, unless the omission is unexplained.[41]

[32] See ante, § 2711.
[33] See ante, § 2713.
[34] See ante, § 2744.
[35] See ante, § 2748.
[36] See ante, § 2723; Hogan v. Brophy, 2 Code R. 77; Sayer v. Kirchhof, 3 Misc. 245, 22 N. Y. Supp. 773. Dismissal is discretionary. Wetmore v. Wetmore, 137 N. Y. 623.
[37] Smith v. Ingram University, 76 Hun, 605, 28 N. Y. Supp. 220.
[38] Vandenbergh v. Mathews, 52 App. Div. 616, 65 N. Y. Supp. 365.
[39] Dalzell v. Long Island R. Co., 119 N. Y. 626.
[40] Rosskam v. Curtis, 15 App. Div. 190, 44 N. Y. Supp. 198.
[41] McGregor v. Comstock, 19 N. Y. 581.

—— **Failure to make, serve, or file case.** There are numerous expressions in the opinions which would indicate that an appeal to the appellate division may be dismissed where no case is made or where the case made is not filed.[42] As stated in a preceding volume, the failure to serve and file a case does not preclude an appeal on the judgment roll alone,[43] and hence where the judgment roll itself brings up any matters for review the appeal should not be dismissed because there is no case.[44] There is some question, however, where the appeal is from judgment entered on a verdict, as distinguished from a judgment entered on a decision or report, whether the appeal should not be dismissed on the ground that an appeal on the judgment roll alone brings nothing up for review. The want of a certificate that the case contains all the evidence is not ground.[45]

—— **Failure to substitute person as party or attorney.** If a person entitled by law to be substituted in place of a party appeals, but unreasonably neglects to procure an order of substitution, the appeal may be dismissed.[46] So if either party to an appeal dies before the appeal is heard, and an order substituting another person in his place is not made within three months after his death, the appeal may be dismissed.[47]

The unexcusable laches of appellant for years after the death of his attorney to substitute another is ground for dismissal.[48]

—— **Matters relating to the calendar.** Failure of the appellant to notice the appeal for argument or place it on the calendar is not ground for dismissal but the remedy of the respondent, if he wishes to hasten proceedings, is to himself perform such acts.[49]

[42] See Spindler v. Gibson, 72 App. Div. 150, 76 N. Y. Supp. 410.

[43] Volume 3, pp. 2653 et seq.

[44] Brush v. Blot, 11 App. Div. 626, 42 N. Y. Supp. 761; Rannow v. Hazard, 61 Super. Ct. (29 J. & S.) 217, 19 N. Y. Supp. 1023.

[45] Matter of Chapin, 84 Hun, 490, 32 N. Y. Supp. 361.

[46] Code Civ. Proc. § 1296. See ante, § 2594.

[47] See ante, § 2594.

[48] McElwain v. Erie R. Co., 71 N. Y. 600.

——**Frivolousness of appeal.** Before the Codes, it was held that an appeal would not be dismissed for frivolousness,[50] and now it would seem that an appeal should not be dismissed on such ground except in a clear case. In order to sustain a motion in the court of appeals to dismiss an appeal on the ground that the exceptions in the case are frivolous, the exceptions must be so obviously frivolous on their face as to require no argument to demonstrate it, and where an examination of the record discloses a number of exceptions that can only be disposed of after argument, the motion will be denied.[51] Questions presented by an appeal from a judgment, which depend upon the pleadings and proofs, will not be disposed of upon a motion to dismiss for frivolousness.[52]

——**Want of jurisdiction.** Want of jurisdiction in the lower court is ground for dismissal,[53] except where the sole ground of the objection is the very question raised by the issue, the determination of which the appeal is brought to review.[54] Where a judgment appealed from is void for want of jurisdiction, but the lack of jurisdiction does not appear from the record on appeal, the better practice is to dismiss the appeal, remitting the parties to a motion in the court below to rid themselves, if need be, of the judgment in that court, rather than to grant a reversal.[55]

——**Review unnecessary or ineffectual.** An appeal may be dismissed if an event has occurred which makes a determination of it unnecessary or renders it impossible for the appellate court to grant effectual relief.[56] Where a decision would be nugatory, the appeal may be dismissed without costs.[57] The

[49] Nichols v. MacLean, 98 N. Y. 458; Hand v. Callaghan, 12 Misc. 88, 33 N. Y. Supp. 176.

[50] Dey v. Walton, 2 Hill, 403; Rogers v. Hosack, 5 Hill, 521.

[51] Bachrach v. Manhattan R. Co., 154 N. Y. 178.

[52] Hooper v. Beecher, 109 N. Y. 609.

[53] So held in condemnation proceedings. Matter of Thomson, 86 Hun, 405, 33 N. Y. Supp. 467.

[54] Ogdensburgh & L. C. R. Co. v. Vermont & C. R. Co., 63 N. Y. 176.

[55] Elmira Realty Co. v Gibson, 103 App. Div. 140, 92 N. Y. Supp. 913.

[56] That moot questions will not be reviewed, see post, § 2781.

[57] Duryea, Watts & Co. v. Rayner, 21 Misc. 536, 47 N. Y. Supp. 712.

termination of a trial by jury, before the appeal from an order denying a motion to send the case to the equity term for trial is heard, requires a dismissal of the appeal.[58] So the vacation by the trial court of the judgment appealed from, since the taking of the appeal, is ground.[59]

§ 2771. Waiver of right to move.

The right to move is not waived by proposing amendments to the case;[60] nor by noticing the case for argument and placing it on the calendar, where the ground for dismissal is that the judgment is not appealable,[61] though the contrary is the rule where the ground for dismissal is that the appeal was not taken in time.[62]

§ 2772. Motion.

In some instances, an appeal may be dismissed on the hearing of the main appeal though no preliminary motion to dismiss has been made. For instance, the objection that the judgment or order appealed from is not appealable may be raised and decided on the main appeal.[63] In other cases, the objection on which a dismissal is sought is waived if not raised by a motion to dismiss made before the hearing of the appeal.[64]

The motion to dismiss must embrace all the grounds relied on.[65]

—— **Time for motion.** The motion to dismiss should be made at the first opportunity after the appeal is perfected, since the motion may be denied for laches in moving.[66] How-

[58] Bennett v. Edison Elec. Il. Co., 18 App. Div. 410, 46 N. Y. Supp. 459.
[59] Duryea v. Fuechsel, 145 N. Y. 654.
[60] Knapp v. Brown, 11 Abb. Pr. (N. S.) 118.
[61] Stoughton v. Lewis, 2 How. Pr. (N. S.) 331.
[62] Pearson v. Lovejoy, 53 Barb. 407, 35 How. Pr. 193.
[63] McKeown v. Officer, 127 N. Y. 687.
[64] Objections to defects in the record must be urged on a "motion" to dismiss. Allen v. Allen, 149 N. Y. 280, 284.
[65] Ferguson v. Bruckman, 164 N. Y. 481.
[66] Stevenson v. McNitt, 27 How. Pr. 335. But delay by mutual consent is not laches. Hill v. Hermans, 59 N. Y. 396.

ever, the motion cannot be made before the time to perfect the appeal has expired. For instance, the motion, where based on the want of or insufficiency of, the undertaking, is premature if made before the time to perfect the appeal has expired.[67]

—— **Who may move.** The motion may be made in the behalf of the appellant or of respondent, or the order may be granted on the court's own motion.[68] An executor or administrator appointed in another state cannot move for leave to withdraw unless he has taken out letters in this state.[69] The motion may be made in the court of appeals, by an attorney for a respondent though such attorney has not been regularly substituted as the attorney of record, because substituted by an order of the court below.[70]

—— **Court in which motion to be made.** A motion to withdraw [71] or dismiss [72] the appeal, must be made in the court to which the appeal is taken. Thus the "special term" cannot make an order declaring an appeal to the appellate division abandoned because of the failure of appellant to procure the settlement and filing of a proposed case.[73] It is the province of the appellate division to dismiss appeals taken to it, and of the lower court to correct errors in the appeal papers or to extend the time for perfecting the papers on the appeal.[74]

—— **Motion papers.** Generally the motion is based on the record and on one or more affidavits showing the grounds on which the dismissal is sought. On a motion to dismiss an appeal, a copy of the record of the court below or of the return

[67] Murray v. Hathaway, 26 State Rep. 53, 7 N. Y. Supp. 915.

[68] Appellant may move. Lanman v. Lewiston R. Co., 18 N. Y. 493.

[69] Warren v. Eddy, 13 Abb. Pr. 28.

[70] Squire v. McDonald, 138 N. Y. 554.

[71] Powell v. Schenck, 6 App. Div. 130, 39 N. Y. Supp. 877.

[72] Brooker v. Filkins, 7 Misc. 390, 27 N. Y. Supp. 918. Barnum v. Seneca County Bank, 6 How. Pr. 82; Howey v. Lake Shore & M. S. R. Co., 15 Misc. 526, 37 N. Y. Supp. 88. Rule applies to appeals from surrogate's court Hynes v. McCreery, 2 Dem. 158.

[73] True v. Sibley, 61 State Rep. 200, 29 N. Y. Supp. 704.

[74] Phelps v. Swan, 32 Super. Ct. (2 Sweeny) 696.

to the appellate court must be one of the motion papers submitted, where the motion is based thereon.[75] If the application is ex parte, the affidavit must state whether any previous application has been made.[76]

—— **Notice of motion.** Notice of the motion should be given to all the parties interested except where the dismissal may be granted on filing an affidavit with the clerk without application to the court.[77]

If the motion is based on an irregularity, the notice should specify the irregularity. The notice should also specify the motion papers, though it has been held that where the motion is made on the record the notice is not fatally defective because it omits to specify on what papers the motion will be made.[78]

The notice must be at least eight days.[79]

The notice should be served on the attorney for the adverse party. If he is dead or removed, the notice may be served as provided for by section 1302 of the Code as to the service of a notice of appeal.[80]

—— Form of notice of motion to dismiss appeal.

[Title of cause.]

Please take notice that on the pleadings and proceedings in the above-entitled action [and on the affidavits of ———, a copy of which is herewith served on you], a motion will be made at the ——— term of the ——— court, to be held at ———, on the ——— day of ———, 190—, at the opening of the court or as soon thereafter as counsel can be heard, for an order dismissing the appeal from the judgment [or "order"] entered in this action on the ——— day of ———, 190—, [if

[75] Hutchison v. Root, 153 N. Y. 329.

[76] Gouraud v. Trust, 17 Hun, 578.

[77] Allen v. Allen, 149 N. Y. 280, 284.

[78] Browne v. Taylor, 69 N. Y. 627.

[79] Hand v. Callaghan, 12 Misc. 88, 33 N. Y. Supp. 176; Kenney v. Sumner, 12 Misc. 86, 33 N. Y. Supp. 95; Salters v. Sheppard, 11 Wkly. Dig. 189.

[80] If notice cannot be served on the attorney for the adverse party, it may be served on the party personally or as directed by the judge. Hickox v. Weaver, 15 Hun, 375. See ante, § 2634.

ground is irregularity, state nature thereof], and for such other or further order as may be proper, with costs of this motion.

[Date.] [Signature and office address of respondent's attorney.]

[Address to attorney for appellant.]

§ 2773. Hearing.

On a motion to dismiss an appeal, the court will not go outside the record further than to see if there has been a waiver of the appeal.[81] The merits will not be considered. A motion to dismiss an appeal because the questions involved have been decided adversely to the appellant in other cases recently determined will be denied where the appellant denies such contention.[82]

§ 2774. Order.

An appeal is not effectually dismissed until an appropriate order has been made and entered.[83] An appeal cannot be deemed waived or abandoned because of want of prosecution, where both parties have slept on their rights.[84]

—— Form of order.

[Title of cause.] At a ——— term, etc.

On reading and filing the notice of motion and the affidavit of ——— [name all motion papers], with proof of due service thereof on the attorney for appellant; and on motion of ———, attorney for ———, the respondent herein, and after hearing ———, attorney for the appellant, and on reading [name opposing papers];

It is ordered that the appeal taken by ———, from the judgment [or "order"] entered herein on the ——— day of ———, be dismissed, with ——— dollars costs of said appeal to the respondent.

§ 2775. Effect of dismissal.

The effect of a dismissal as precluding a second or further appeal has been considered.[85] The appellate division cannot,

[81] O'Brien v. Smith, 37 State Rep. 43, 13 N. Y. Supp. 410.

[82] Clark v. Claflin, 128 N. Y. 610.

[83] Stewart v. Berge, 4 Daly, 477.

[84] Pacific Mail S. S. Co. v. Toel, 9 Daly, 301.

[85] See ante, § 2528.

after dismissing an appeal on the facts and the law, vacate and set aside the judgment, since a dismissal deprives it of jurisdiction over the judgment or proceedings.[86]

§ 2776. Reinstatement.

In a proper case, the appeal may be reinstated after its dismissal. The motion to reinstate should be made promptly as it may be denied for laches and acquiescence.[87] Where the attorney for one of several defendants stipulated to withdraw his appeal under the misapprehension that he would have the benefit of the appeal of his co-defendants, and there was a reversal which did not benefit him, he was allowed to serve his appeal papers on payment of the taxable costs of the action to date.[88] But when an appeal to the court of appeals has been dismissed for failure to serve papers, and the remittitur has been sent down, judgment entered thereon, and execution issued, a motion will not be entertained to reinstate the appeal.[89] Where an appeal is dismissed for want of a return, the appeal will not be reinstated because of an alleged omission of the clerk, unless a clear case of diligence or some accident or unforeseen state of things is shown, which prevented the appellant from procuring the return or an extension of time.[90] A motion to be relieved from a second regular default on appeal will be denied if the appeal appears to be without merits.[91]

[86] Westerfield v. Rogers, 174 N. Y. 230.
[87] Matter of Boston, 19 Wkly. Dig. 470.
[88] Higgins v. Starin, 39 App. Div. 533, 57 N. Y. Supp. 306.
[89] Remedy in such a case, see Jones v. Anderson, 71 N. Y. 599.
[90] Spoore v. Fannan, 16 N. Y. 620.
[91] Luft v. Graham, 13 Abb. Pr. (N. S.) 175.

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§ 2777. What law governs.

The review of the judgment or order appealed from is controlled by the law as it stood when the judgment or order was rendered.[1]

§ 2778. Stipulations as affecting scope of review.

The scope of the review may be limited by stipulation[2] but cannot be enlarged.

§ 2779. Trial de novo.

The court of appeals and the appellate division and appellate term of the supreme court are limited to a review of the actual proceedings of the lower court, except that where an appeal is taken on the facts to the appellate division from the surrogate's court the appellate division has the same power to decide questions of fact which the surrogate had and may receive further testimony or documentary evidence and appoint a referee.[3]

—— **Additional proof.** New evidence cannot be heard for any purpose, nor can new affidavits be read on an appeal from an order,[4] even though all the parties to the appeal consent thereto,[5] except that a record may be produced on the hearing of an appeal to "sustain" the judgment,[6] though not to

[1] Cole v. Mahoney, 67 How, Pr. 226; Cole v. Fall Brook Coal Co., 159 N. Y. 59.

[2] Riggs v. Commercial Mut. Ins. Co., 125 N. Y. 7, 10.

[3] Code Civ. Proc. § 2586.

[4] Smith v. Smith, 43 Super. Ct. (11 J. & S.) 140; People ex rel. Day v. Bergen, 53 N. Y. 404; Wells, Fargo & Co. v. Wellsville, C. & P C. R. Co., 12 App. Div. 47, 42 N. Y. Supp. 225. Affidavits of newly-discovered evidence will not be received on appeal. People ex rel. Dady v. Thirty-First Ward Sup'r, 91 Hun, 206, 36 N. Y. 348. The appeal must be decided on the original papers. Cambels v. McDonald, 2 State Rep. 129.

[5] Thompson v. Taylor, 13 Hun, 201.

[6] Hewett v. Chadwick, 8 App. Div. 23, 40 N. Y. Supp. 144; Toole v.

reverse it.[7] Documentary evidence which proves itself and on which no question can arise in the cause, except such as is apparent on its face, may be produced at the argument of the appeal, where it was inadvertently or unadvisedly omitted at the trial.[8] Such evidence being in its nature incontrovertible, it would be idle to send the case back for a new trial for the sole purpose of admitting it.[9] This rule does not, however, authorize independent and additional evidence, especially if other counter evidence might have been given had the question been raised at the trial.[10] So a total failure to prove a fact requiring documentary evidence, notwithstanding objection at the trial, cannot be obviated by producing the evidence on the appeal.[11]

Custom and usage cannot be proved as a question of fact in the appellate court.[12] nor can the law of a foreign state.[13]

Oneida County Sup'rs, 13 App. Div. 471, 37 N. Y. Supp. 9, 43 N. Y. Supp. 1160. Certificate to affidavit of service made without the state. Miller v. Jones, 67 Hun, 281, 22 N. Y. Supp. 86.

[7] The rule is well settled that record evidence not in the return may be read by the court on review in support of a decision, although not to secure a reversal. People ex rel. Warschauer v. Dalton, 159 N. Y. 235, 239; Wines v. City of New York, 70 N. Y. 613; Matter of Cooper, 93 N. Y. 507; Dunham v. Townshend, 118 N. Y. 281; Atlantic Ave. R. Co. v. Johnson, 134 N. Y. 375; Day v. Town of New Lots, 107 N. Y. 148, 157; People ex rel. Manhattan R. Co. v. Barker, 146 N. Y. N. Y. 304. But the court may consider a copy of a paper omitted from the case, for the purpose of supplying defects in the case caused by the neglect of the parties to print it therein. Munoz v. Wilson, 111 N. Y. 295.

[8] Bank of Charleston v. Emeric, 4 Super. Ct. (2 Sandf.) 718; Porter v. Waring, 69 N. Y. 250. An omission in proof of a matter of record may be supplied on appeal to sustain a judgment where the record cannot be answered or changed. Dunford v. Weaver, 84 N. Y. 445. Rule does not apply to notorial certificate of protest. Brooks v. Higby, 11 Hun, 235. Does apply to leases. Catlin v. Grissler, 57 N. Y. 363; Moller v. Duryee, 21 Wkly. Dig. 459.

[9] Dunham v. Townshend, 118 N. Y. 281.

[10] Hall v. U. S. Reflector Co., 21 Wkly. Dig. 37.

[11] Moser v. City of New York, 21 Hun, 163.

[12] Marine Nat. Bank v. National City Bank, 59 N. Y. 67.

[13] Hunt v. Johnston, 44 N. Y. 27; Prouty v. Michigan Southern & N.

—— **Amendments.** The power to, and propriety of allowing an amendment of the pleadings in the appellate court, will be considered in a following chapter.[14]

§ 2780. Review on appeal from part of judgment or order.

Only the parts of the judgment or order which are appealed from can be reviewed.[15]

§ 2781. Abstract questions.

Abstract, otherwise designated as moot or academic, questions, ordinarily will not be reviewed [16] no matter how interesting or important they may be to the general public or to the legal profession,[17] and notwithstanding the appellate division has certified such questions for review.[18]

The fact that the question in litigation has ceased to be a practical one as between the parties does not, however, preclude a review thereof where the question is one of public importance affecting the right of electors.[19] Thus, the fact that election day has passed does not prevent a review of the question as to the validity of an order striking a name from the registry list,[20] or a question as to the regularity of a nomination for public office, especially where there is a conflict in the decisions of the supreme court.[21]

I. R. Co., 4 T. & C. 230; Lawson v. Pinckney, 40 Super. Ct. (8 J. & S.) 187.

[14] See post, § 2824.

[15] Kelsey v. Western, 2 N. Y. (2 Comst.) 500; Robertson v. Bullions, 11 N. Y. (1 Kern) 243.

[16] Stein v. Kesselgrub, 45 Misc. 652, 91 N. Y. Supp. 64; National Sav. Bank v. Slade, 17 App. Div. 115, 44 N. Y. Supp. 934.

[17] Bryant v. Thompson, 128 N. Y. 426.

[18] Hearst v. Shea, 156 N. Y. 169; Coatsworth v. Lehigh Valley R. Co., 156 N. Y. 451.

[19] Matter of Cuddeback, 3 App. Div. 103, 39 N. Y. Supp. 388. See Matter of Norton, 158 N. Y. 130, where election question was held not to be of sufficient public importance to authorize its review after election.

[20] Matter of Gage, 141 N. Y. 112.

[21] Matter of Fairchild, 151 N. Y. 359.

So the fact that the attached property has been sold and the proceeds applied, will not preclude a review of an order denying a motion to vacate an attachment, where the motion to vacate was made before the property was applied to the payment of the judgment.[22] So a question, otherwise an abstract one, will be reviewed to protect appellant from a collateral liability on an undertaking given to procure an injunction.[23] An appeal should not be dismissed because of the want of a practical question where a question of a restoration of costs which have been paid is involved,[24] though a later case holds that relief from a judgment for costs, merely, does not authorize a review of an abstract question.[25]

That a question has been settled by the enactment of a statute does not render it academic where there are several cases to be decided under the law as it existed prior to such legislative enactment.[26]

§ 2782. Interlocutory determinations.

The power to review an interlocutory judgment or intermediate order, on an appeal from a final judgment, has been considered in a preceding chapter.[27] Intermediate orders and proceedings cannot be reviewed on an appeal from an interlocutory judgment, but an appeal from an interlocutory judgment sustaining a demurrer to the complaint and dismissing the complaint brings up the question as to the sufficiency of the complaint.[28]

An appeal from an order does not authorize the review of any other order, no matter how closely the two orders may be united or how interdependent they may be.[29] For instance,

[22] Market Nat. Bank v. Pacific Nat. Bank, 30 Hun, 50.
[23] Williams v. Montgomery, 148 N. Y. 519.
[24] Martin v. W. J. Johnston Co., 128 N. Y. 605.
[25] Matter of Croker, 175 N. Y. 158.
[26] Bush v. O'Brien, 164 N. Y. 205.
[27] See ante, § 2631.
[28] Keene v. Tribune Ass'n, 76 Hun, 488, 27 N. Y. Supp. 1045.
[29] Matter of Com'rs of Central Park, 50 N. Y. 493; Baltimore & O. R.

an appeal from an order denying a motion to vacate [30] or resettle [31] a previous order not appealed from does not bring up the previous order for review, except where the first order was granted ex parte; [32] but on an appeal from an order made on an order to show cause, a review of all that was included in the order to show cause is proper.[33]

§ 2783. Errors not urged in lower court.

The rule that error cannot be first urged on appeal is elementary. The duty of the appellate court is to "review" the proceedings in the trial court, and hence it follows that questions not raised below cannot be raised on appeal.[34] There is an exception to this rule, however, in that an objection relating to an issue litigated in the trial court may be first urged in the appellate court where it is one which could not have been obviated if it had been urged in the trial court.[35] It follows that an objection to the jurisdiction of the court over the "subject-matter" may be first urged in the appellate court,[36] as may the objection that the complaint does not state facts sufficient to constitute a cause of action. It has also been held that in an action, such as an action to annul a marriage, where the state has an interest in the disposition of the

Co. v. Arthur, 90 N. Y. 234; Matter of Bornemann, 6 App. Div. 524, 39 N. Y. Supp. 686; Rawson v. Silo, 105 App. Div. 278, 93 N. Y. Supp. 416.

[30] Rusk v. Marston, 1 Wkly. Dig. 566.

[31] Lippincott v. Westray, 6 Civ. Proc. R. (Browne) 74.

[32] See Everitt v. Park, 88 Hun, 368, 34 N. Y. Supp. 827.

[33] Stanton v. King, 76 N. Y. 585.

[34] Bendix v. Saul, 34 Misc. 774, 68 N. Y. Supp. 800. This rule applies, inter alia, to defenses (Davidson v. Mexican Nat. R. Co., 11 App. Div. 28, 42 N. Y. Supp. 1015); the question as to the right to sue (Dunham v. Fitch, 48 App. Div. 321, 62 N. Y. Supp. 905); the scope of the issue (Moses v. Hatch, 21 App. Div. 468, 47 N. Y. Supp. 554); etc. Facts admitted in the lower court cannot be denied in the appellate court. Ostermann v. Goldstein, 31 Misc. 501, 64 N. Y. Supp. 555.

[35] Scott v. Morgan, 94 N. Y. 508; Beekman v. Frost, 18 Johns. 544.

[36] Volume 1, pp. 1090, 1091; Worthington v. London Guarantee & Acc. Co., 47 App. Div. 609, 62 N. Y. Supp. 591; Burk v. Ayers, 19 Hun, 17; Armstrong v. Loveland, 99 App. Div. 28, 90 N. Y. Supp. 711.

cause, objections are reviewable though not urged in the lower court.[37]

Among the objections which are frequently held to be waived by a failure to urge in the trial court are objections to the nature or form of the remedy,[38] to nonjoinder or misjoinder of parties,[39] to defects in the pleadings,[40] to the propriety of the amendment of a pleading,[41] to a variance between the pleadings and the proof,[42] to the admission of evidence,[43] to instructions to the jury given or refused,[44] to a provision for costs in a judgment and for the allowance of an execution,[45] etc.

A ground not stated in a motion in the lower court cannot be first urged on appeal, to obtain a reversal, as a reason why the motion should have been granted. For instance, grounds of a motion for a nonsuit not specified in the trial court cannot be first urged on appeal.[46] However, the fact that the lower court erroneously grants a motion on a certain ground is not cause for a reversal where the motion should have been granted on another ground urged in the lower court.[47]

The objection made in the lower court, to be available on appeal, must be specified.[48]

A party who has acquiesced in the trial of an action on a certain theory will not be heard to assert for the first time on

[37] Di Lorenzo v. Di Lorenzo, 71 App. Div. 509, 75 N. Y. Supp. 878.

[38] Objection that there is an adequate remedy at law cannot be first urged on appeal. Nickerson v. Canton Marble Co., 35 App. Div. 111, 54 N. Y. Supp. 705.

[39] Campbell v. Hieland, 55 App. Div. 95, 66 N. Y. Supp. 1116. See vol. 1, p. 1091.

[40] Thornton v. Moore, 41 App. Div. 617, 58 N. Y. Supp. 1150.

[41] Miller v. Fiss, 21 Misc. 66, 46 N. Y. Supp. 967.

[42] Cahill Iron Works v. Pemberton, 48 App. Div. 468, 62 N. Y. Supp. 944.

[43] Volume 2, pp. 2264–2277.

[44] Barnes v. Loew, 20 App. Div. 7, 46 N. Y. Supp. 901. See vol. 2, p. 2342.

[45] La Grange v. Merritt, 96 App. Div. 61, 89 N. Y. Supp. 32.

[46] Rawson v. Leggett, 97 App. Div. 416, 90 N. Y. Supp. 5.

[47] See post, § 2786.

[48] Volume 2, pp. 2265–2269.

appeal that there was error in adopting the theory he assisted in establishing as the law of the case.[49] In other words, relief cannot be claimed in an appellate court on a theory not urged, or on issues not raised, on the trial.[50] For instance, where a plaintiff sets up a cause of action ex delicto and is defeated, the judgment will not be reversed on appeal because a judgment ex contractu might properly have been rendered if such judgment had been prayed for in the lower court.[51]

Whether a motion for a nonsuit or to direct a verdict is necessary to authorize a review of the evidence has been treated of in a preceding volume,[52] as have the rules relating to the necessity of moving to have the issues submitted to the jury, after a ruling on a motion for a nonsuit or for a directed verdict.[53]

§ 2784. Errors not shown by the record.

Error not appearing in the record cannot be reviewed.[54] The errors relied on must be apparent from the record and must be presented by it. For instance, the propriety of a bill of particulars cannot be inquired into where the bill is not in the record.[55] So where the record does not contain the pleadings, nor anything from which a right to a preference on the calendar can be determined, an order denying such preference cannot be reviewed.[56] So where the record does not contain a judgment, a recital of a judgment in the notice of appeal is

[49] Caponigri v. Altieri, 165 N. Y. 255, 263. See cases in 1 Abb. Cyc. Dig. 516–518.

[50] Matter of Atwood, 3 App. Div. 578, 38 N. Y. Supp. 338.

[51] Lockwood v. Quackenbush, 83 N. Y. 607.

[52] Vol. 2, p. 2301. Of course the failure to move does not preclude the right to insist that the verdict is against the weight of the evidence.

[53] Vol. 2, p. 2293.

[54] People ex rel. Krulish v. Fornes, 175 N. Y. 114; Terwilliger v. Wheeler, 81 App. Div. 460, 81 N. Y. Supp. 173; M. Groh's Sons v. Groh, 80 App. Div. 85, 80 N. Y. Supp. 438; Sommer v. Sommer, 87 App. Div. 434, 88 N. Y. Supp. 444. See Code Civ. Proc. § 1315, last clause.

[55] Bolte v. Third Ave. R. Co., 38 App. Div. 234, 56 N. Y. Supp. 1038; see, also, Handy v. Powers, 70 App. Div. 618, 75 N. Y. Supp. 385.

[56] Marando v. T. A. Gillespie Co., 54 App. Div. 488, 66 N. Y. Supp. 1027.

not sufficient, as the court cannot review a judgment not before it.[57] And where, after the close of the evidence, a motion was made for a nonsuit and to dismiss the complaint, and the court reserved its decision until after the verdict, and on its rendition granted the motion and dismissed the complaint on the merits, but the record does not show the answers to the specific questions submitted to the jury, the review is the same as if no verdict had been rendered.[58] As will be noticed hereafter, an appeal from an order denying a new trial will usually be dismissed where the order does not state the grounds of the motion,[59] though it is held that where a motion to dismiss a complaint is based on several grounds, and the record does not show on what ground it was granted, the order will be sustained if it was proper on any of the grounds.[60]

It is held that an alleged error appearing in the opinion of the court, but not elsewhere in the record, will not be considered,[61] though there is some question as to whether such rule is good law now, inasmuch as the opinion is a part of the record. Unless the statute requires the order of reversal to itself state the grounds therefor,[62] the appellate court may refer to the opinion for the grounds on which the court acted where the order so refers.[63]

§ 2785. Harmless error.

It being admitted that error has been committed, it does not necessarily follow that the appellate court must reverse because thereof. The error may have had no effect on the result,

[57] Smith v. Ely, 46 Misc. 458; 92 N. Y. Supp. 310.

[58] O'Sullivan v. Knox, 81 App. Div. 438, 80 N. Y. Supp. 848.

[59] See post, § 2800.

[60] Holm v. Empire Hardware Co., 102 App. Div. 505, 92 N. Y. Supp. 914.

[61] Laning v. New York Cent. R. Co., 49 N. Y. 521, 539. Followed in People ex rel Cashman v. Heddon, 32 Hun, 299. See, also, Rawson v. Silo, 105 App. Div. 278, 93 N. Y. Supp. 416.

[62] Townsend v. Bell, 167 N. Y. 462, 467.

[63] Snyder v. Snyder, 96 N. Y. 88; Tolman v. Syracuse, B. & N. Y. R. Co., 92 N. Y. 353.

in which case it is termed harmless error. If the error is harmless, the appellate court disregards it and will not reverse therefor. Harmless error is error which has resulted in no prejudice to the party seeking to take advantage of it.[64] For instance, errors committed against an appellant who in no event is entitled to succeed in his action or defense are harmless. So error in permitting an amendment to a pleading increasing the claim for damages is harmless where the recovery did not exceed the amount originally claimed.[65]

The court will not reverse for an error in appellant's favor.[66]

—— **Rulings on evidence.** Error in receiving or rejecting evidence "in an action at law" is presumed to be prejudicial and is to be disregarded only when the court can clearly see that no harm resulted therefrom,[67] i. e., where the appellate court, on an examination of the entire case, is enabled to determine beyond a reasonable doubt that the evidence could not have been detrimental to appellant.[68] The improper admission of evidence to prove an admitted fact is harmless,[69] as is the erroneous admission of evidence on an immaterial issue,[70] or

[64] Error cured in trial court, see post, § 2787. Error too trifling to require reversal, see post § 2818. Who may urge error, see post, §§ 2788–2790.

[65] Clark v. Brooklyn Heights R. Co., 78 App. Div. 478, 79 N. Y. Supp. 811.

[66] Cowles v. Watson, 14 Hun, 41; Meltzer v. Doll, 91 N. Y. 365; Fuller v. Jamestown St. R. Co., 75 Hun, 273, 26 N. Y. Supp. 1078. Error in admitting evidence. Becker v. Laitin, 23 Misc. 756, 50 N. Y. Supp. 635. Error in amount of judgment. Desmond v. Crane, 39 App. Div. 190, 57 N. Y. Supp. 266. Instructions. Wolf v. Third Ave. R. Co., 67 App. Div. 605, 74 N. Y. Supp. 336.

[67] Hall v. United States Radiator Co., 76 App. Div. 504, 78 N. Y. Supp. 549. Baird v. Gillett, 47 N. Y. 186. This rule applies to the admission of evidence which is merely cumulative. Osgood v. Manhattan Co., 3 Cow. 612. The error is not harmless if the evidence bears in the least degree on the result. Worrall v. Parmelee, 1 N. Y. 519.

[68] Bennett v. Donovan, 83 App. Div. 95, 82 N. Y. Supp. 506.

[69] Pescia v. Societa Co-Op. C. F. B., 91 App. Div. 506, 86 N. Y. Supp. 952.

[70] E. H. Ogden Lumber Co. v. Busse, 92 App. Div. 143, 86 N. Y. Supp. 1093; Sweet v. Henry, 175 N. Y. 268.

where the only point on which it bears is abundantly proven by competent evidence.[71] Error in admitting evidence is harmless where it is plain that it was not regarded by the jury in arriving at their verdict,[72] or was not given effect by the judge or referee where the trial was without a jury.[73] So where certain evidence has been admitted without objection, the subsequent admission of substantially similar evidence is harmless.[74] The admission of immaterial evidence which is of no weight and could have no effect on the jury is harmless, but the rule is otherwise where the evidence has a tendency to excite the passions, arouse the prejudices, awaken the sympathies, or warp or influence the judgment of the jurors in any degree.[75] So the erroneous admission of evidence is harmless, though it is made the basis of a finding, where the finding is unnecessary to support the judgment.[76] The erroneous admission of evidence on the question of damages is harmless where the court has properly held that plaintiff is not entitled to recover.[77] But error in admitting evidence cannot be said to be harmless where the party objecting to it is obliged to call a witness to explain or contradict it.[78]

The exclusion of evidence which could not have affected the result is harmless,[79] but it must plainly appear that the rejected evidence could not have legitimately changed the result.[80] Error in excluding evidence which, if admitted, would have

[71] Buckley v. Westchester Lighting Co., 93 App. Div. 436, 87 N. Y. Supp. 763; Chamberlain v. Cuming, 99 App. Div. 561, 91 N. Y. Supp. 105; Bogue v. Newcomb, 1 T. & C. 251; Matter of Bernsee, 71 Hun, 27, 24 N. Y. Supp. 504.

[72] Petrie v. Petrie, 126 N. Y. 683.

[73] Taylor v. Enoch Morgan's Sons Co., 124 N. Y. 184; Collis v. Bull, 75 Hun, 466, 27 N. Y. Supp. 478.

[74] Beyer v. Isaacs, 104 App. Div. 12, 93 N. Y. Supp. 312.

[75] Anderson v. Rome, W. & O. R. Co., 54 N. Y. 335, 341.

[76] Hey v. Collman, 78 App. Div. 584, 79 N. Y. Supp. 778.

[77] Kennedy v. Mineola, H. & F. Traction Co., 178 N. Y. 508.

[78] Anderson v. Rome, W. & O. R. Co., 54 N. Y. 335, 342.

[79] Wheeler v. Ruckman, 51 N. Y. 391; Taylor v. Taylor, 74 Hun. 639, 26 N. Y. Supp. 246.

[80] People v. Strait, 154 N. Y. 165.

entitled the party to no more than nominal damages on his counter-claim, is not ground for reversal.[81] Striking out evidence, on the motion of the party who introduced it, is harmless where it has in no way inured to the benefit of the adverse party.[82]

The rule prevailing in chancery that errors in the admission or exclusion of evidence were not ground for reversal provided that, duly considering the evidence excluded or disregarding the evidence admitted, the decision was just and adequately supported by legal evidence, still obtains in equity suits tried without a jury and in equity suits where certain issues are tried by a jury.[83] The presumption in equity cases is that the error was harmless while in common-law cases the presumption is that it was prejudicial. But while in equity cases it will be presumed that the trial judge disregarded incompetent or irrelevant evidence, it cannot be said that it will necessarily be presumed that the "rejection" of competent evidence was harmless and had no effect on the findings of the trial judge.[84]

—— **Charge to jury.** An erroneous charge on an abstract question is harmless,[85] unless it probably influenced the verdict.[86] An instruction is harmless where it could not have affected the result,[87] as where it relates to a matter as to which

[81] Lyons v. Smith, 36 App. Div. 627, 55 N. Y. Supp. 148. See, also, post, § 2818.

[82] Hubner v. Metropolitan St. R. Co., 77 App. Div. 290, 79 N. Y. Supp. 153.

[83] De St. Laurent v. Slater, 23 App. Div. 70, 48 N. Y. Supp. 1103; Shaffer v. Martin, 25 App. Div. 501, 49 N. Y. Supp. 853; Tuerk Hydraulic Power Co. v. Tuerk, 92 Hun, 65, 36 N. Y. Supp. 384; Brunnemer v. Cook & Bernheimer Co., 89 App. Div. 406, 409, 85 N. Y. Supp. 954; Matter of New York Cent. & H. R. R. Co., 90 N Y. 342, 347; Wyse v. Wyse, 155 N. Y. 367, 372. These cases overrule Foote v. Beecher, 78 N Y. 155, which holds that the rule in equity suits is the same as in legal actions.

[84] Ward v. Hoag, 78 App. Div. 510, 79 N. Y. Supp. 706, and cases cited.

[85] Walrod v. Ball, 9 Barb. 271; Lyon v. Marshall, 11 Barb. 241.

[86] Willson v. Betts, 4 Denio, 201.

[87] Clover v. Greenwich Ins. Co., 101 N. Y. 277; Alston v. Jones, 17 Barb. 276.

the jury have found for the party objecting,[88] and the charge could not have affected the amount of the recovery.[89] Errors in the charge are harmless where a verdict was directed at the close of the case.[90] An erroneous refusal to charge as to the measure of damages is harmless where no damages are recovered.[91] Whether error in one part of a charge is cured by a correct statement of the law in another portion of the charge depends largely on the circumstances of each case.[92]

—— **Findings of court or referee.** The refusal of a judge or referee, where the trial is without a jury, to make a particular finding, is harmless where the refusal is not prejudicial to appellant.[93] An immaterial finding will be disregarded, even if erroneous,[94] and findings without evidence to support them are harmless if the judgment was justified by the facts found on proper evidence.[95] Inconsistent conclusions of law are harmless where the judgment entered is in accordance with the correct conclusions of law on the facts found.[96]

§ 2786. Error as to grounds of decision.

An appellate court is not confined to the grounds assigned by the court below for its decision but may sustain a judgment on grounds other than those assigned by the lower court.[97] If a ruling or decision was correct in fact, it will not be reversed,

[88] Exemplary damages. Hoard v. Peck, 56 Barb. 202.
[89] Jesper v. Press Pub. Co., 76 Hun, 64, 27 N. Y. Supp. 619.
[90] Griffiths v. Hardenbergh, 41 N. Y. 464.
[91] Smith v. Cowan, 3 App. Div. 230, 38 N. Y. Supp. 482.
[92] Vol. 2, pp. 2348, 2349.
[93] Findings of fact. Woodman v. Penfield, 6 N. Y. Supp. 803; Morris v. Wells, 26 State Rep. 9, 7 N. Y. Supp. 61; Galle v. Tode, 74 Hun, 542 26 N. Y. Supp. 633. Findings of law. Loeb v. Hallman, 83 N Y. 601.
[94] Dixon v. Rice, 16 Hun, 422.
[95] Wetmore v. Bruce, 118 N. Y. 319; London v. Martin, 79 Hun, 229, 29 N. Y. Supp. 396.
[96] Knox v. Metropolitan El. R. Co., 58 Hun, 517, 12 N. Y. Supp. 848.
[97] Simar v. Canaday, 53 N. Y. 298, 300; People ex rel. Sweet v. Lyman, 157 N. Y. 368, 387. Where the appellate division reverses the lower court on a certain ground, the court of appeals may affirm the appellate division though not agreeing with it as to the ground of reversal. If the reversal was proper for any error of law, raised by exception, it will be sustained. Reed v. McConnell, 133 N. Y. 425.

though it was based on an erroneous reason,[98] except where, had the correct reason been stated, the unsuccessful party could have remedied the defects of his case,[99] i. e., unless the erroneous ground has misled the party to his injury,[100] as where it led appellant to omit evidence which would have altered the case.[101] By this rule must be answered the question whether the appellate division can sustain an order on a ground not assigned by the trial court where the ground assigned by the trial court is wrong and the ground relied on to sustain the order was not urged in the lower court.[102] Where a pleading is demurred to on two grounds and the demurrer is sustained on one, an appeal brings up both grounds.[103]

A decision based on several grounds will not be reversed because some of the grounds are erroneous.[104]

§ 2787. Errors cured in lower court.

The appellate court will not reverse because of error which was cured in the lower court. Whether error in receiving evidence may be cured by subsequently striking it out,[105] or by an instruction to the jury to disregard it,[106] has been considered in a preceding volume. The erroneous exclusion of

[98] Starer v. Stern 100 App. Div. 393, 91 N. Y. Supp. 821. Wrong reason for rejecting evidence. Cooper v. Hill Bros. & Co., 50 App. Div. 304, 63 N. Y. Supp. 1046.

[99] Gillespie v. Torrance, 17 Super. Ct. (4 Bosw.) 36; Scott v. Pilkington, 15 Abb. Pr. 280.

[100] Ward v. Hasbrouck, 169 N. Y. 407, 420.

[101] Wisser v. O'Brien, 35 Super. Co. (3 J. & S.) 149.

[102] Under Code Civ. Proc. § 999, providing that the judge presiding at a trial by a jury may grant a new trial on exceptions, or because the verdict is for excessive or insufficient damages or otherwise contrary to the evidence or contrary to law, where a motion is made for a new trial on all the grounds named in the statute, and an order is made sustaining the motion as to one ground and denying it as to the rest, the order cannot be reversed on appeal if the moving party is entitled to have the verdict set aside on either of the grounds mentioned in the motion and statute. Ross v. Metropolitan St. R. Co., 104 App. Div. 378, 93 N. Y. Supp. 679.

[103] Donnelly v. West, 17 Hun, 564.

[104] Ostrander v. Hart 130 N. Y. 406, 413.

[105, 106] Volume 2, pp. 2276, 2277.

evidence is cured where it, or like testimony, was afterwards admitted.[107] The introduction of similar evidence by the party objecting cures the error in admitting evidence.[108] So error in admitting documentary evidence without a proper foundation being laid for its admission is cured by the subsequent reception of sufficient proof for that purpose.[109] The admission of evidence, improper because not within the pleadings, may be cured by an amendment of the pleadings.[110] So the error in the exclusion of evidence may be cured by a subsequent amendment of the pleadings which makes the evidence inadmissible.[111] Error in refusing to grant a nonsuit may be cured by evidence afterwards introduced which sustains the verdict.[112] Whether error in an instruction is cured by another correct instruction has been treated of.[113] Whether improper remarks to the jury are cured by an instruction to disregard them cannot be determined by any fixed rule.[114]

§ 2788. Errors affecting respondent.

Only the objections which the appellant raises can be considered on appeal, since a party who omits to appeal virtually assents to the judgment.[115] For instance, the appellate court cannot offset against an item of error against the appellant another erroneous decision as to a larger amount against the re-

[107] Brunnemer v. Cook & Bernheimer Co., 89 App. Div. 406, 85 N. Y. Supp. 954; Gregory v. Lindsay, 61 N Y. 649; Benedict v. Eldridge, 14 App. Div. 625, 43 N. Y. Supp. 979; Van Dyke v. Gardner, 22 Misc. 113, 49 N. Y. Supp. 328; Taft v Little, 78 App. Div. 74, 79 N. Y. Supp. 507.

[108] Machin v. Lamar Fire Ins. Co., 90 N. Y. 689; Brayton v. Sherman, 24 State Rep. 369, 5 N. Y. Supp. 602.

[109] Byrnes v. Byrnes, 102 N. Y. 4.

[110] General Elect. Co. v. National Contracting Co., 178 N. Y. 369.

[111] Harrison v. Forsyth, 33 Super. Ct. (1 J. & S.) 269.

[112] Lansing v. Van Alstyne, 2 Wend. 561; Berg v. Parsons, 84 Hun, 60, 31 N. Y. Supp. 1091.

[113] Volume 2, p. 2348.

[114] See vol. 2, pp. 2209, 2302, 2307.

[115] Bell v. Holford, 8 Super. Ct. (1 Duer) 58. See, also Magnus v. Buffalo R. Co., 24 App. Div. 449, 48 N. Y. Supp. 490. Where respondents do not appeal they are bound by the findings of fact made by the trial court. Cox v. Stokes, 156 N. Y. 491.

spondent, where he has not appealed therefrom.[116] But while a respondent can have no benefit from his exception to the admission of incompetent evidence, he may, on appeal, insist that it be disregarded in determining whether appellant made out a case.[117] If plaintiff appeals from a judgment in his favor, defendant cannot urge that the complaint should have been dismissed.[118]

§ 2789. Errors affecting co-party not appealing.

Error affecting only a co-party who does not appeal is not ground for reversal.[119]

§ 2790. Errors which appellant is estopped to allege.

A party at whose request or instigation an act has been done, a theory adopted, or a ruling made, cannot thereafter insist on appeal that there was error in doing as he requested.[120]

§ 2791. Presumptions.

Certain presumptions are indulged by the appellate court in support of the judgment or order appealed from, but none ordinarily exist to support a reversal inasmuch as error must affirmatively appear. The burden is on the appellant to show that the judgment or order is erroneous,[121] and no presumptions will be indulged in in favor of the appellant.[122] The

[116] Monnet v. Merz, 127 N. Y. 151.

[117] Winne v. Hills, 91 Hun, 89, 36 N. Y. Supp. 683.

[118] Carples v. New York & H. R. Co., 16 App. Div. 158, 44 N. Y. Supp. 670.

[119] Roberts v. Johnson, 58 N. Y. 613; Mahr v. Bartlett, 53 Hun, 388, 7 N. Y. Supp. 143; Wolf v. Horn, 12 Misc. 100, 33 N. Y. Supp. 173; Bennett v. Donovan, 83 App. Div. 95, 82 N. Y. Supp. 506.

[120] Proestler v. Kuhn, 49 N. Y. 654; Prentice v. Goodrich, 1 App. Div. 15, 36 N. Y. Supp. 740; Side v. Brenneman, 7 App. Div. 273, 40 N. Y. Supp. 3. For other cases, see 1 Abb. Cyc. Dig. 504, 505.

[121] Juliand v. Watson, 43 N. Y. 571. One who claims that an error was committed must cause it clearly to appear. Wells v. Garbutt, 132 N. Y. 430; Bell v. Moran, 25 App. Div. 461, 50 N. Y. Supp. 982. Rule applied to alleged error in exclusion of evidence. Blum v. Langfeld, 37 App. Div. 590, 56 N. Y. Supp. 298.

[122] Bolen v. Crosby, 49 N. Y. 183; Heye v. Tilford, 2 App. Div. 346, 37

legal presumption is that the judgment or order appealed from is correct,[123] and every reasonable intendment, on questions of fact as well as of law, is to be made in support of the judgment or order appealed from;[124] but errors once shown to exist will not be presumed harmless.[125] Where an order strikes out a pleading as sham and frivolous, it will be presumed on appeal that it was stricken out as sham, since a frivolous answer cannot be stricken out.[126] It will be presumed that the jury followed the instructions of the court as to disregarding evidence.[127] However, the judgment appealed from will not be sustained on a mere presumption of law, not suggested or passed on below, where the evidence would not sustain a finding in accordance with it.[128] On appeal to the court of appeals, it will be presumed that the appellate division considered the merits of the order appealed from.[129]

—— **Jurisdictional facts.** The existence of facts necessary to confer jurisdiction of the subject-matter on the trial court will be presumed, on appeal from a judgment, unless the contrary affirmatively appears of record,[130] except where the appeal is from a court of inferior jurisdiction.

—— **Ground for granting new trial.** On an appeal from an order granting a new trial, without specifying any grounds, it will be presumed that the order was granted on exceptions

N. Y. Supp. 751; Northampton Nat. Bank v. Kidder, 49 Super. Ct. (17 J. & S.) 338, 13 Abb. N. C. 376.

123 Williamson v. Field, 2 Barb. Ch. 281. This rule applies equally well to an appeal from a county court judgment reversing a justice's judgment. Peck v. Nichols, 18 Wkly. Dig. 268. It applies to a trial by a referee. Kaphon v. Tucker, 35 App. Div. 310, 55 N. Y. Supp. 8.

124 Mead v. Bunn, 32 N. Y. 275.

125 Livingston v. Metropolitan El. R. Co., 138 N. Y. 76; Greene v. White, 37 N. Y. 405; Quinlivan v. Buffalo, R. & P. R. Co., 52 App. Div. 1, 64 N. Y Supp. 795; Hanlon v. Ehrich, 80 App. Div. 359, 80 N. Y. Supp. 692; Baldinger v. Levine, 83 App. Div. 130, 82 N. Y. Supp. 483.

126 How v. Elwell, 57 App. Div. 357, 67 N. Y. Supp. 1108.

127 Ballard v Hitchcock Mfg. Co., 71 Hun, 582, 24 N. Y. Supp. 1101.

128 Vose v. Florida R. Co., 50 N. Y. 369.

129 Tracey v. Altmeyer, 46 N. Y. 598.

130 Kent v. West, 33 App. Div. 112, 125, 53 N. Y. Supp. 244.

taken during the trial,[131] especially where the payment of costs is not imposed as terms of granting it.[132]

—— **Filing of decision as basis for judgment.** If it is stipulated that the record contains a true copy of the judgment roll, but it contains no decision by the court, it will be presumed that none was filed and therefore that the judgment was erroneously entered.[133]

—— **Findings of fact.** Where there is evidence in the case sufficient to sustain the decision of the court or the report of a referee, but a fact thereby established is not expressly found, it will be presumed on appeal that the judge or referee found the fact necessary to sustain the judgment;[134] but this rule does not apply where the judge or referee expressly refuses to find such fact,[135] nor where the evidence is conflicting and the trial court has not been requested to determine the fact either way,[136] nor where the evidence is insufficient to warrant such a finding,[137] nor where the facts do not tend to support the special findings.[138] Where no case is made, and the appeal is on the judgment roll alone, it cannot be assumed, where the findings of fact are insufficient to uphold the judgment, that there was evidence on the trial sufficient to justify other findings of facts which would support the conclusions of law. Such a presumption is permissible only where there is a case.[139]

[131] Badanes v. Feder, 93 N. Y. Supp. 478.

[132] Robinson v. Lampel, 97 App. Div. 198, 89 N. Y. Supp. 853; Roney v. Aldrich, 44 Hun, 320.

[133] Kent v. Common Council of Binghampton, 90 App. Div. 553, 86 N. Y. Supp. 411.

[134] Valentine v. Conner, 40 N. Y. 248; Oberlander v. Spiess, 45 N. Y. 175. In other words, undisputed facts appearing in the evidence may be considered for the purpose or upholding the judgment though not embraced in the findings made by the court. Dyke v. Spargur, 143 N. Y. 651; Lennon v. Smith, 23 App. Div. 293, 48 N. Y. Supp. 456. Court can look into the evidence for the purpose of reversing findings of fact. Excelsior Brick Co. v. Village of Haverstraw, 142 N. Y. 146; Ostrander v. Hart, 130 N. Y. 406.

[135] Meyer v. Amidon, 45 N. Y. 169.

[136] Hollister v. Mott, 132 N. Y. 18.

[137] Zeiss v. America Wringer Co., 62 App. Div. 463, 70 N. Y. Supp. 1110.

[138] Armstrong v. Du Bois, 90 N. Y. 95.

[139] Rochester Lantern Co. v. Stiles & Parker Press Co., 135 N. Y. 209,

A finding in a special verdict must be deemed to be found on proper and sufficient evidence.[140]

—— **Where case does not contain all the evidence.** If the case does not purport to contain all the evidence, it will be presumed that there was sufficient evidence to sustain the verdict.[141] or findings of fact.[142]

—— **On appeal from nonsuit or directed verdict.** On an appeal from a nonsuit, it will be presumed that plaintiff could have proved material facts contained in his offer of proof.[143] The propriety of denying a nonsuit must be determined, on appeal, from all the evidence and not merely from that given by plaintiff's witnesses.[144] On appeal from a dismissal upon the complaint and opening of plaintiff's counsel, the facts alleged in the complaint and stated in the opening, together with every inference that can fairly be drawn from them, must be assumed to be true.[145] So, on reviewing an order dismissing a complaint for the insufficiency of the evidence, plaintiff's testimony must be taken as true, and must be given the benefit of all inferences which the jury might properly have found in plaintiff's favor had the case been submitted.[146] So where, at the close of a trial, both parties ask for a directed verdict, and neither request the submission of any fact to the jury, all facts and inferences necessary to support the judgment, which

followed in Ingersoll v. Cunningham, 95 App. Div. 571, 88 N. Y. Supp. 711. But see Comer v. Mackey, 73 Hun, 236, 25 N. Y. Supp. 1023.

[140] Wright v. Douglas, 7 N. Y. (3 Seld.) 564.

[141] Campion v. Rollwagen, 43 App. Div. 117, 59 N. Y. Supp. 308; Meislahn v. Irving Nat. Bank, 62 App. Div. 231, 70 N. Y. Supp. 988.

[142] Volume 3, p. 2665.

[143] O'Connor v. Moody 90 App. Div. 440, 86 N. Y. Supp. 214.

[144] Croft v. Haight, 51 App. Div. 265, 64 N. Y. Supp. 882.

[145] Oakeshott v. Smith, 104 App. Div. 384, 93 N. Y. Supp. 659.

[146] Waldron v. Fargo, 170 N. Y. 130; Taylor v. Commercial Bank, 68 App. Div. 458, 73 N. Y. Supp. 924; Bruss v Metropolitan St. R. Co., 66 App. Div. 554, 73 N. Y. Supp. 256; O'Hara v. City of Brooklyn, 57 App. Div. 176, 68 N. Y. Supp. 210; Lane v. Lamke, 53 App. Div. 395, 65 N. Y. Supp. 1090. This rule also applies to a dismissal by a referee at the close of plaintiff's proof. Steigerwald v. Manhattan R. Co., 50 App. Div. 487, 64 N. Y. Supp. 125.

could have been derived from the facts of the case, will be presumed to have been found by the court in favor of the party for whom a verdict was directed.[147]

§ 2792. Review of inconsistent findings of fact.

It is the duty of the appellate court to harmonize the findings, if it can do so, and arrive at the real intention of the court making them,[148] but when it cannot, by any reasonable construction, reconcile the findings of fact, it is bound to accept the findings most favorable to the appellant.[149] Such is the general rule though it has been held that if the findings are capable of two constructions, and the evidence is not contained in the case, the appellate court will adopt the construction which will sustain the judgment.[150] If facts found by the court or the referee in the decision or report conflict with facts specially found on the request of a party, the latter govern on appeal.[151]

§ 2793. Review on second or further appeal.

On a second or further appeal, the questions of law settled by the same court on a prior appeal in the same case will not be reviewed,[152] unless there has been some plain mistake, as

[147] Trimble v. New York Cent. & H. R. R. Co., 162 N. Y. 84; Adams v. Roscoe Lumber Co., 159 N. Y. 176; Raegener v. Hubbard, 40 App. Div. 359, 57 N. Y. Supp. 1018; Seidenspinner v. Metropolitan Life Ins. Co., 70 App. Div. 476, 74 N. Y. Supp. 1108; Davis v. True, 89 App. Div. 319, 85 N. Y. Supp. 843; Appel v. Ætna Life Ins. Co., 86 App. Div. 83, 83 N. Y. Supp. 238.

[148] Bennett v. Bates, 94 N. Y. 354, 367, 368.

[149] Bonnell v. Griswold, 89 N. Y. 122; Traders' Nat. Bank v. Parker, 130 N. Y. 415; Parsons v. Parker, 159 N. Y. 16; Israel v. Manhattan R. Co., 158 N. Y. 604, 631. Of course a special finding controls a general one. Phelps v. Vicher, 50 N. Y. 69, 72. If findings contained in the case, as settled by a referee, conflict with those contained in his report, the former will be deemed correct. Schwinger v. Raymond, 83 N. Y. 192.

[150] Drake v. Village of Port Richmond, 1 App. Div. 243, 37 N. Y. Supp. 191.

[151] Sisson v. Cummings, 35 Hun, 22.

[152] Todd v. Union Dime Sav. Inst. 128 N. Y. 636; Cluff v. Day, 141 N.

in overlooking some statutory provision or some controlling decision, such as would require the court to grant a reargument.[153]

Where the same state of facts is presented on a second as on the first appeal, the appellate court will not review the grounds of the former decision to pass on a question then in the case but to which attention was not called by counsel.[154]

ART. II. APPEALS TO THE COURT OF APPEALS.

A. QUESTIONS OF FACT.

§ 2794. General rule.

Only questions of law are reviewable by the court of appeals. The Constitution so provides,[155] as does the Code.[156] The Code further provides that "an appeal to the court of appeals from a final judgment, or from an order granting or refusing a new trial in an action, where the appellant stipulates that upon affirmance judgment absolute shall be rendered against him, brings up for review in that court only questions of law."[157]

Y. 580; Mygatt v. Coe, 142 N. Y. 78; Buell v Village of Lockport, 8 N. Y. (4 Seld.) 55; Stegman v. Hollingsworth, 6 App. Div. 609, 39 N. Y. Supp. 1132; Hart v. Thompson, 39 App. Div. 668, 57 N. Y. Supp. 334. This rule applies though the former decision was not unanimous and the reasoning of those who concurred was not in harmony. Oakley v. Aspinwall, 13 N. Y. (3 Kern.) 500. The rule applies though the former appeal was decided in another department of the appellate division. Feldman v. McGraw, 14 App. Div. 631, 43 N. Y. Supp. 885; Stokes v. Hyde, 24 App. Div. 624, 48 N. Y. Supp. 717. Where the court of appeals writes no opinion, it is to be assumed that it has approved of the opinion of the court below on every question necessary to a decision of the case. Sullivan v. New York El. R. Co., 14 Misc. 426, 36 N. Y. Supp. 16. Law laid down on appeal from order, though not res adjudicata on an appeal from another order in the case, will usually be followed where the facts are the same. Stine v. Greene, 65 App. Div. 221, 72 N. Y. Supp. 729.

153 Eaton v. Alger, 47 N. Y. 345.

154 Joslin v. Cowe, 56 N. Y. 626.

155 Const. art. 6, § 9.

156 Code Civ. Proc. § 191, subd. 3.

157 Code Civ. Proc. § 1337.

§ 2795. Matters of discretion.

Portions of a judgment, orders, or rulings on the trial, which may rest in discretion, are not reviewable by the court of appeals,[158] unless there is a refusal to exercise discretion on the ground of want of power,[159] or there is an exercise of discretion without power, as where the appellate division reverses the order on the ground of want of power of the trial court to exercise the discretion.[160] In short, only the "power" to grant a discretionary order is reviewable by the court of appeals;[161] for instance, an allowance of costs, where discretionary and not in excess of the limitations provided by statute, is not reviewable,[162] as where the appellate division modified a judgment by making it with, instead of without, costs, in an equity action.[163] So a judgment granting a divorce, in so far as it awards the custody of the children, is discretionary, so that where the court does not exceed its powers, that portion of the judgment cannot be reviewed in the court of appeals.[164] An order of the appellate division refusing a writ, which order does not state the ground of decision, cannot be reversed where the writ may have been refused as a matter of discretion.[165] An order of the appellate division simply dismissing a common-law writ of certiorari, without affirming the pro-

[158] Matter of Attorney-General, 155 N. Y. 441. Discretion of appellate division cannot be reviewed. Merriam v. Wood & Parker Lith. Co., 155 N. Y. 136. Discretion in issuing or refusing an injunction is not unlimited as facts may be proved which will raise a question of law reviewable by the court of appeals. Penrhyn Slate Co. v. Granville Electric Light & Power Co., 181 N. Y. 80.

[159] Laning v. New York Cent. R. Co., 49 N. Y. 521; Tilton v. Beecher, 59 N. Y. 176; Marvin v. Marvin, 78 N. Y. 541; Cashman v. Reynolds, 25 Abb. N. C. 392.

[160] Russell v. Randall, 123 N. Y. 436; Birge v. Berlin Iron Bridge Co., 133 N. Y. 477.

[161] Standard Trust Co. v. New York Cent. & H. R. R. Co., 178 N. Y. 407.

[162] Allen v. Stevens, 161 N. Y. 122, 149.

[163] Husted v. Van Ness, 158 N. Y. 104, 108.

[164] Osterhoudt v. Osterhoudt, 168 N. Y. 358.

[165] People ex rel. Durant Land Imp. Co. v. Jeroloman, 139 N. Y. 14, 18, followed in People ex rel. Jacobus v. Van Wyck, 157 N. Y. 495.

ceedings or in any way passing on the question sought to be reviewed, is a discretionary order not appealable to the court of appeals;[166] but if the quashing or dismissal of the writ was for want of jurisdiction or on the ground that the proceedings were found regular,[167] or on the ground that the relator had no authority to obtain or prosecute the writ,[168] the order is reviewable.

Where the appellate division allows an appeal and certifies a question of law for review, the presumption is that its determination was made on the merits, unless it expressly appears by the record that it was made in the exercise of discretion.[169]

What are discretionary orders and rulings not reviewable will not be further considered in this connection, but reference should be made to the portions of the particular chapter dealing with the order or ruling which it is sought to review.

B. QUESTIONS OF LAW.

§ 2796. General rule.

The general rule is that all questions of law, with one exception, where properly preserved for review by exception where an exception is allowable, are reviewable by the court of appeals, provided the question has been actually determined by the appellate division and is not an abstract question. The exception is that, where the appellate division unanimously affirms, the court of appeals cannot consider the question of law whether there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court.

A refusal of the judge or referee, where the trial is without a jury, to find a fact, where the evidence in support of it is uncontroverted, would seem, where excepted to, to raise a ques-

[166] People ex rel. Coler v. Lord, 157 N. Y. 408.

[167] People ex rel. O'Conner v. Queens County Sup'rs, 153 N. Y. 370, 374.

[168] People ex rel. Forest Commission v. Campbell, 152 N. Y. 51.

[169] Matter of Davies, 168 N. Y. 89, 96.

tion of law, reviewable by the court of appeals if the judgment is not "unanimously" affirmed by the appellate division.[170]

§ 2797. On appeal from unanimous affirmance.

The Constitution provides that "No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court shall be reviewed by the court of appeals."[171] This provision is repeated in its identical language in the Code.[172] What constitutes a unanimous affirmance has already been considered.[173]

This rule applies without regard to whether the trial was by the court, jury, or a referee. It applies to special proceedings as well as to actions.[174] It also applies, it would seem, since the restoration in 1904 of requests to find, where a proposed finding of fact is requested and refused and an exception taken thereto, so that whether there is uncontroverted evidence to support such a finding cannot be reviewed where there is a unanimous affirmance. It not only precludes the court of appeals from reviewing the weight of the evidence but takes away from its jurisdiction the right to review a question which is a question of law.[175] The constitution does not affect cases of nonsuit, or directed verdict, or reversal by the appellate division, or cases where there was a dissent in that court, but it does require that when a trial court or jury has decided that a fact is proved and five judges in the appellate division have unanimously held that it was proved, controversy about that fact will end, and that any question of law

[170] So held under section 1023 of the Code as it existed before its reenactment in 1904. Bohm v. Metropolitan El. R. Co., 129 N. Y. 576.

[171] Const. art. 6, § 9.

[172] Code Civ. Proc. § 191, subd. 4.

[173] See ante, § 2543.

[174] People ex rel. Manhattan R. Co. v. Barker, 152 N. Y. 417, 434, followed in People ex rel. Broadway Imp. Co. v. Barker, 155 N. Y. 322.

[175] Marden v. Dorthy, 160 N. Y. 39. This one question of law has been withdrawn from the cognizance of the court of appeals, as well as all questions of fact. Id.

mixed with that of fact, shall be separately raised and presented in order to be reviewed by the court of appeals.[176]

A finding as to what is the law of another state is a finding of fact not reviewable after a unanimous affirmance.[177]

The court of appeals cannot review the question whether a contract is void under the statute of frauds where the question is dependent on the determination of a fact in issue under the pleadings which has been settled by a unanimous affirmance by the appellate division.[178] So the court of appeals cannot look at the evidence to see whether requests to charge would logically have been fatal to the disposition of a motion for a nonsuit or for direction of a verdict, if such a motion had been made.[179]

The unanimous affirmance of a judgment founded wholly on immaterial evidence, every portion of which was duly objected to, will not prevent the consideration of questions raised by exceptions to the rulings.[180]

Not only must the express findings of fact by the trial court be taken as true, and be neither subtracted from nor added to but also implied findings[181] and facts not found but which are expressly or impliedly negatived by the effect of the unanimous decision.[182]

The existence of facts to support the judgment cannot be inquired into even when the decision is in the "short-form," as authorized prior to 1903.[183] Where the decision of the special

[176] Report of judiciary committee in last Constitutional Convention. See Reed v. McCord, 160 N. Y. 330, 336.

[177] Genet v. Delaware & Hudson Canal Co., 163 N. Y. 173, 177; Spies v. National City Bank, 174 N. Y. 222, 227.

[178] Lamkin v. Palmer, 164 N. Y. 210.

[179] McGuire v. Bell Tel. Co., 167 N. Y. 208, 211.

[180] Woods Motor Vehicle Co. v. Brady, 181 N. Y. 145.

[181] Trustees of Amherst College v. Ritch, 151 N. Y. 321, followed in People ex rel. Manhattan R. Co. v. Barker, 152 N. Y. 417, 435.

[182] Lawrence v. Congregational Church, 164 N. Y. 115, 121. Facts can neither be added to or taken away from. Marden v. Dorthy, 160 N. Y. 39, 46; Hilton v. Ernst, 161 N. Y. 226; Krekeler v. Aulbach, 169 N. Y. 372.

[183] Hutton v. Smith, 175 N. Y. 375, 377.

term is a "short-form" decision and the judgment is affirmed, all the facts warranted by the evidence and necessary to support the judgments below are presumed to have been found.[184]

—— **Affirmance of nonsuit.** If the trial court finds the facts established by the evidence in favor of the defendant, and on such findings dismisses the complaint on the merits, no review can be had after a unanimous affirmance, but if the trial results in a nonsuit, a unanimous affirmance does not preclude a review to ascertain if there is any evidence supporting the cause of action,[185] provided the ruling was excepted to in the lower court.

—— **Effect of leave to appeal.** The right to review this question as to the existence of any evidence to support the verdict or findings cannot be conferred by the granting of leave to appeal.[186]

—— **Necessity of finding by appellate division that there is evidence to sustain finding.** A unanimous affirmance of the judgment or order appealed from necessarily affirms all the findings of fact essential to support the decision made below, the same as the affirmance of a general verdict, and hence it is unnecessary, in such a case, to specify what particular findings of fact are sustained by evidence.[187]

—— **Burden of showing unanimity of affirmance.** If it does not appear that the affirmance was unanimous, it will be assumed that it was not unanimous.[188] The burden of showing that the affirmance by the appellate division was unanimous is on the party alleging the fact, and the fact must be shown

[184] Amherst College v. Ritch, 151 N. Y. 282, 320; City of Niagara Falls v. New York Cent. & H. R. R. Co., 168 N. Y. 610.

[185] Ware v. Dos Passos, 162 N. Y. 281, 282; Jones v. Reilly, 174 N. Y. 97, 104. But see Gzuchy v. Hillside Coal & Iron Co., 150 N. Y. 219. What constitutes a nonsuit, see Deeley v. Hintz, 169 N. Y. 129. Lindenthal v. Germania Life Ins. Co., 174 N. Y. 76; Veazey v. Allen, 173 N. Y. 359, 367.

[186] See ante, § 2620; Reed v. McCord, 160 N. Y. 330; Caponigri v. Altieri, 164 N. Y. 476.

[187] People ex rel. Manhattan R. Co. v. Barker, 152 N. Y. 417, 438.

[188] Perez v. Sandrowitz, 180 N. Y. 397.

either by an express statement of the appellate division or by a certificate of that court appearing in the record.[189]

§ 2798. On appeal from affirmance by divided court.

Where the justices of the appellate division from which an appeal is taken are divided on the question as to whether there is evidence supporting, or tending to support, a finding or verdict not directed by the court, such question is presented for review by the court of appeals.[190] Findings of fact, though the affirmance is not unanimous, will not, however, be disturbed unless wholly without evidence to support them.[191]

§ 2799. On appeal from reversal where trial without a jury.

The question as to the scope of the review where the appeal is from the order granting a new trial, on a reversal of the judgment,[192] or from a judgment of reversal where no new trial is granted, depends on whether the reversal is on the law or on the facts.

—— **Where reversal is on the law.** The court of appeals has recently held that where a judgment is reversed for error of law there are only three questions which the court of appeals can consider; i. e., (1) error in receiving or rejecting evidence, (2) whether the conclusions of law are supported by the facts found, and (3) whether any material finding of fact is without any evidence to support it.[193] Since the decision in such case, the Code provision authorizing requests to find was re-enacted in 1904, and it is submitted that now, where the appellate division reverses on the law, the court of appeals may, in addition, consider the court's refusal to grant a request to find a

189 Laidlaw v. Sage, 158 N. Y. 73, 86.

190 Code Civ. Proc. § 1337.

191 People ex rel. Town of Colesville v. Delaware & Hudson Co., 177 N. Y. 337, 343.

192 Though appeal is from order granting a new trial, the judgment of reversal must also be reviewed. Code Civ. Proc. § 1318.

193 National Harrow Co. v. Bement & Sons, 163 N. Y. 505.

fact proven by uncontroverted evidence, where such refusal is duly excepted to.[194]

A reversal on the ground that there is no evidence to sustain a finding of a material fact is a reversal on a question of law.[195] However, the appellate division cannot reverse on the law where it merely decides that a lien was waived, where the trial court found as a fact that the lien existed, since a finding that the lien had been waived is a reversal on the facts.[196]

Where the decision is a "short-form" one, such as authorized before 1903, and the judgment entered thereon is reversed on the law, all facts warranted by the evidence and necessary to support the judgment will be presumed to have been found.[197] This rule does not apply, however, to that part of a judgment dismissing the complaint as to one defendant, since as to that defendant the plaintiff has no judgment to be supported by such a presumption.[198] So the mere fact that the order of reversal states that the findings of fact are sustained by the evidence does not require the court of appeals to presume that the referee found every fact necessary to support the judgment, where such fact is not expressly stated in the report, where the necessary finding was not within the scope of the pleadings and the evidence.[199]

—— **Where the reversal is on the facts.** A reversal, where the trial is without a jury, is on the facts unless it is based on one of the following classes of error:

1. A material error in receiving or rejecting evidence.
2. A failure of the facts found to support the conclusions of law.

[194] The cases of National Harrow Co. v. Bement & Sons, 163 N. Y. 505, 515, and New York Cent. & H. R. R. Co. v. Auburn I. Elec. R. Co., 178 N. Y. 75, 78, are not now the law in regard to such matter.

[195] Shotwell v. Dixon, 163 N. Y. 43, 47.

[196] Blumenberg Press v. Mutual Mercantile Agency, 177 N. Y. 362.

[197] Dannhauser v. Wallenstein, 169 N. Y. 199, 205; People v. Adirondack R. Co., 160 N. Y. 225, 235.

[198] Deering v. Schreyer, 171 N. Y. 451, 458.

[199] The court of appeals is not required, in such a case, to presume that the referee found facts against the evidence or against the admissions of the pleadings. Rodgers v. Clement, 162 N. Y. 422, 427.

3. The finding of a material fact without any evidence to support it.

4. The refusal to find, on request, a fact established by uncontroverted evidence.

A judgment cannot be reversed on the facts where all the facts are of record and uncontroverted.[200]

Prior to the adoption of the constitution of 1895, section 1338 of the Code authorized the court of appeals to review questions of fact where the reversal of the general term was based on the facts. But now where the reversal by the appellate division is stated to be on the facts, the court of appeals has jurisdiction to entertain an appeal from the order of reversal, but only to determine whether a question of fact actually was presented on the evidence for the determination of the appellate division.[201] In other words, when the appellate division "reverses" on the "facts," a "question of law" arises as to whether there was "any" evidence to support the view of that court. If it appears that there was any material and controverted question of fact, the decision thereof by the appellate division is final,[202] but if there is no view which may fairly be taken of the evidence that supports the reversal by the appellate division, i. e., there is no question of fact in the case, the court of appeals may reverse the appellate division and affirm the judgment of the lower court.[203]

——**Where reversal is both on the law and the facts.** Where the appellate division reverses on the facts as well as on the law, the court of appeals must first examine the record to see if there was a material question of fact on which a reversal could be founded. If it appears that the facts are conceded and uncontroverted a question of law arises which is reviewable,[204] but if the court of appeals finds that there was a material question of fact on which a reversal could be founded,

200 Westerfield v. Rogers, 174 N. Y. 230.

201 Health Dept. of New York v. Dassori, 159 N. Y. 245.

202 Otten v. Manhattan R. Co., 150 N. Y. 395, 401; Health Dept. of New York v. Dassori, 159 N. Y. 245.

203 Otten v. Manhattan R. Co., 150 N. Y. 395, 401.

204 Griggs v. Day, 158 N. Y. 1.

it can proceed no further but must either affirm the judgment or dismiss the appeal;[205] and in such a case, while it has been the custom to dismiss the appeal, a late case holds that "constant disregard of our admonitions makes it necessary to affirm as a rule and dismiss only in rare instances where peculiar circumstances require that course in order to prevent injustice."[206]

Whether there is a question of fact in a case is always a question of law, depending possibly on a conflict of evidence and possibly on conflicting inferences which may be drawn from uncontradicted evidence.[207] Where the inferences from the uncontradicted evidence all point in one direction so that a reasonable mind can reach but one conclusion, there is no question of fact, and the court of appeals has jurisdiction to review though the reversal is stated to be "on the law and on the facts."[208] The form of an order of the appellate division reversing a judgment and granting a new trial is not material with respect to showing whether the reversal was on the facts where there are no disputed questions of fact.[209]

The certificate of the appellate division that it has reversed on the facts as well as on the law, limits the scope of review of the court of appeals though the opinion of the appellate division reviews only questions of law.[210]

—— **Where order does not state whether reversal is on the law or on the facts.** The court of appeals, on an appeal (1) from a judgment reversing a judgment entered on the report of a referee or a determination in the trial court, or (2) from an order granting a new trial on such a reversal, must presume that the judgment was not reversed, or the new trial granted, on a question of fact, unless the contrary clearly

[205] Crooks v. People's Nat. Bank, 177 N. Y. 68; Matter of Totten, 179 N. Y. 112; Vollkommer v. Cody, 177 N. Y. 124, 127.

[206] Crooks v. People's Nat. Bank, 177 N. Y. 68.

[207] Otten v. Manhattan R. Co., 150 N. Y. 395, 401.

[208] Matter of Totten, 179 N. Y. 112.

[209] Buffalo & L. Land Co. v. Bellevue Land & Imp. Co., 165 N. Y. 247, 253.

[210] Spies v. Lockwood, 165 N. Y. 481.

appears in the record body of the judgment or order appealed from.[211]

This presumption must be indulged in though a reference to the opinion indicates that the judgment was reversed on the facts.[212] In short, if the "record" does not show that the reversal was wholly or partly on the facts, it will be presumed to be on the law so that the same questions will be presented for review as if it had been expressly stated that the reversal was on the law. The fact that the record is silent as to the ground of reversal, does not, however, require the court to assume that the appellate division actually decided that there was evidence to support the findings.[213]

This Code provision does not apply to jury trials,[214] nor to an appeal from a town board since it is neither a court nor a referee,[215] but it does apply to the review of an order of reversal in a special proceeding.[216]

If there is a reversal not stated to be on the facts, the court of appeals cannot consider whether plaintiff's claim was barred by limitations where there was no finding on that subject.[217]

§ 2800. On appeal from reversal where trial was by jury.

If the appeal to the appellate division is solely from the judgment entered on a verdict, the grounds of the reversal need not be stated, since the reversal must have been on the law because the appellate division itself, in such a case, cannot review questions of fact. If the appeal is from the judgment entered on a verdict and also from an order denying a new trial on discretionary grounds, the order of reversal is not reviewable in the court of appeals unless it shows that, while the

211 Code Civ. Proc. § 1338; Parker v. Day, 155 N. Y. 383; Petrie v. Hamilton College, 158 N. Y. 458.

212 Hinckel v. Stevens, 165 N. Y. 171; Lannon v. Lynch, 160 N. Y. 483.

213 People ex rel. Village of Brockport v. Sutphin, 166 N. Y. 163.

214 Henavie v. New York Cent. & H. R. R. Co., 154 N. Y. 278.

215 People ex rel. Village of Brockport v. Sutphin, 166 N. Y. 163, 169.

216 People ex rel. Manhattan R. Co. v. Barker, 165 N. Y. 305, 312.

217 Matteson v. Palser, 173 N. Y. 404, 413.

judgment was reversed, the order denying a motion for a new trial was affirmed or the appeal therefrom was dismissed, or that the reversal of the judgment and order was solely on the law. Merely stating that the reversal was solely on the law is not sufficient, however, without adding that as to the facts the order was approved, and where that is the form of the order of reversal the appeal will be dismissed. In actions tried by a jury, where the appeal to the appellate division is from both the judgment and the order denying a new trial and the order of reversal does not state whether the reversal was on the law or the facts, no review by the court of appeals is permissible, since the reversal may have been on the ground that the verdict was against the weight of evidence.[218] Where the appellate division reverses, both on questions of law and of fact, a judgment entered on a verdict and an order denying a motion for a new trial on exceptions and because the verdict was against the evidence, and grants a new trial, there can be no review on an appeal from the order granting a new trial unless it affirmatively appears that the appellate division has affirmed the facts, since an order granting a new trial is appealable to the court of appeals as of right only when granted "on exceptions."[219] In no case tried before a jury in which

[218] Henavie v. New York Cent. & H. R. R. Co., 154 N. Y. 278; Hoes v. Edison General Elec. Co., 150 N. Y. 87; Schryer v. Fenton, 162 N. Y. 444; People v. Slauson, 179 N. Y. 586. The court of appeals has repeatedly refused to entertain jurisdiction of orders of the appellate division reversing judgments and granting new trials where the judgments have been entered upon verdicts, and motions for new trials have been made and denied, unless the court, in its orders, in effect, certified that these reversals were upon the law only, and that it had examined the facts, and found no reason for interfering with the verdict upon the ground that it was against the weight of evidence. Canavan v. Stuyvesant, 154 N. Y. 84; Henavie v. New York Cent. & H. R. R. Co., 154 N. Y. 278; Schoen v. Wagner, 156 N. Y. 697; Judson v. Central Vt. R. Co., 158 N. Y. 597; Livingston v. City of Albany, 161 N. Y. 602; Schryer v. Fenton, 162 N. Y. 444; Albring v. New York Cent. & H. R. R. Co., 166 N. Y. 287; Id., 174 N. Y. 179; Reich v. Dyer, 180 N. Y. 107.

[219, 220] Allen v. Corn Exch. Bank, 181 N. Y. 278.

a motion for a new trial has been made on the ground that the verdict is against the evidence can the court of appeals entertain an appeal from the order, where leave to appeal has not been granted, unless it affirmatively appears that the appellate division has affirmed on the facts.[220]

§ 2801. On appeal from order granting a new trial.

Where a judgment, from which an appeal is taken, is reversed upon the appeal, and a new trial is granted, an appeal cannot be taken from the judgment of reversal; but upon an appeal from the order granting a new trial, taken, as prescribed by law, the judgment of reversal must also be reviewed.[221]

§ 2802. On appeal by leave of court.

The scope of the review where the appeal is by leave of court, i. e., the question whether the review is limited to the questions certified, has already been considered.[222]

§ 2803. Review of interlocutory judgment or order refusing a new trial.

As already noted,[223] where final judgment is entered in the lower court after the appellate division affirms an interlocutory judgment or refuses a new trial either on an original application or on an appeal from an order, and an appeal is taken to the court of appeals directly from the final judgment entered, the appeal brings up for review only the determination of the appellate division affirming the interlocutory judgment or refusing the new trial.[224] If, on the other hand, an appeal is taken from the final judgment to the appellate division and thence to the court of appeals, the interlocutory judgment or refusal of a new trial must be specified for review

[221] Code Civ. Proc. § 1318.
[222] See ante, §§ 2541, 2620.
[223] See ante, § 2729.
[224] Code Civ. Proc. § 1336.

in the notice of appeal, if appellant desires a review thereof, and a cross-appeal must be taken if respondent desires a review thereof.[225]

§ 2804. Necessity of exceptions.

The general rule is that only those questions of law which are raised by exception can be reviewed in the court of appeals,[226] but no exception is necessary to authorize the review of a question of law arising on a verdict where judgment has been rendered on a verdict subject to the opinion of the court,[227] nor is an exception necessary where there was no opportunity to except.[228] The court cannot review the question whether there is any evidence to support a verdict unless a motion for a nonsuit or to direct a verdict has been made at the close of the trial, and an exception taken to the denial thereof.[229] So the question whether a finding of fact has any evidence to support it cannot be urged unless the finding has been duly excepted to.[230] Stipulations of the parties consenting to a review, in the absence of exceptions, are nugatory.[231]

§ 2805. Review of constitutionality of a statute.

Questions involving the constitutionality of a law will not be considered unless such questions are essential to the deter-

[225] Code Civ. Proc. § 1350.

[226] Wangner v. Grimm, 169 N. Y. 421, 427; Alden v. Supreme Tent of K. of M., 178 N. Y. 535, 542; Cooper v. New York, O. & W. R. Co., 180 N. Y. 12. Constitutional question held sufficiently preserved for review by the court of appeals by an exception to the decision of the trial court. People ex rel. Bush v. Houghton, 182 N. Y. 301.

[227] Code Civ. Proc. § 1339.

[228] Volume 2, p. 2344.

[229] Volume 2, pp. 2294, 2301. The exception is waived where based on the denial of a motion made at the close of plaintiff's evidence, if not renewed at the close of all the evidence. Sigua Iron Co. v. Brown, 171 N. Y. 488, 506.

[230] Israel v. Manhattan R. Co., 159 N. Y. 624.

[231] Briggs v. Waldron, 83 N. Y. 582.

mination of the appeal.[232] Furthermore, such questions cannot be first urged in the court of appeals.[233]

ART. III. APPEAL TO APPELLATE DIVISION FROM TRIAL OR SPECIAL TERM.

§ 2806. Review on appeal from judgment entered on a verdict.

"Where the judgment was rendered on the verdict of a jury, the appeal may be taken upon questions of law."[234] This means that where the final judgment is appealed from, but no motion for a new trial is made or the order is not appealed from, only questions of law can be reviewed.[235] The facts can be reviewed only where there is (1) a motion for a new trial, (2) an order entered thereon,[236] (3) the order states the grounds of the motion,[237] (4) an appeal is taken from the order or it is specified for review in the notice of appeal from the judgment, and (5) the case shows that it contains all the evidence.[238] There are cases, however, holding that the absence of a certificate that the case contains all the evidence does not preclude a review of questions of fact where the trial is by a jury, if a motion for a new trial has been made, because the motion for a new trial constitutes a sufficient notice to the respondent of an intention to review the questions of fact, and

[232] Matter of Attorney-General, 155 N. Y. 441, 446; Curtin v. Barton, 139 N. Y. 505.

[233] Delaney v. Brett, 51 N. Y. 78.

[234] Code Civ. Proc. § 1346.

[235] Rollins v. Sidney B. Bowman Cycle Co., 96 App. Div. 365, 370, 89 N. Y. Supp. 289; Alden v. Supreme Tent of K. of M., 178 N. Y. 535; Schlesinger v. Columbian Fire Ins. Co., 37 App. Div. 531, 56 N. Y. Supp. 37.

[236] May v. Menton, 20 Misc. 723, 45 N. Y. Supp. 1047.

[237] Koehler v. New York Steam Co., 71 App. Div. 222, 75 N. Y. Supp. 597. Where a motion for a new trial is based solely on exceptions, no disputed question of fact can be raised on the appeal. Metropolitan Nat. Bank v. Sirret, 97 N. Y. 320.

[238] See vol. 3, p. 2666.

imposes upon him the duty of adding to the record any omitted fact essential, in his judgment, to sustain the ruling.[239] It is submitted, however, that such holdings are not to be followed since no exception can be taken to a ruling on a motion for a new trial,[240] and it is only where an exception can be, and is, taken, that the respondent is called on to see that the evidence to support the ruling is contained in the case.

It should be remembered, however, that the propriety of granting or refusing a nonsuit or a directed verdict raises a question "of law" and not one of fact, and hence such a ruling may be reviewed though the case does not contain all the evidence,[241] provided the ruling has been duly excepted to.[242]

§ 2807. Review on appeal from final judgment on trial without a jury.

The Code provides that where final judgment is rendered on a trial by a referee or by the court without a jury "the appeal may be taken upon questions of law, or upon the facts, or upon both."[243] If the appeal is based on the judgment roll alone, only questions of law are brought up for review.[244] Questions of fact cannot be reviewed unless the certificate to the case or case and exceptions states that all the evidence given on the trial is included;[245] but where a finding of fact is excepted to on the ground that there is no evidence to support it, it is not necessary that the case contain all the evidence to authorize a review of the exception since the exception raises a question of law so as to put on respondent the duty

[239] Hochberger v. Baurn, 46 Misc. 425, 92 N. Y. Supp. 244.

[240] Jarvis v. Furman, 25 Hun, 391.

[241] Kissam v. Jones, 56 Hun. 432, 10 N. Y. Supp. 94; Stevens v. Schroeder, 40 App. Div. 590, 58 N. Y. Supp. 52.

[242] Volume 2, p. 2294, note 683.

[243] Code Civ. Proc. §§ 993, 1346. This section does not apply to special proceedings. Baumann v. Moseley, 63 Hun, 492, 18 N. Y. Supp. 563.

[244] Kinnan v. Sullivan County Club, 26 App. Div. 213, 50 N. Y. Supp. 95; Simpson v. Hefter, 43 Misc. 608, 88 N. Y. Supp. 282.

[245, 246] Volume 3, p. 2665.

of adding by amendment to the case any omitted evidence on the question.[246] And, it is submitted, the same rule applies where the court or referee refuses a request to find, based on uncontroverted evidence, and an exception is taken thereto, since the exception raises a question of law so as to place on respondent the duty of seeing that the evidence to support the refusal is contained in the case.

In the absence of a case, where the decision is a short-form one, it will be presumed that the facts found were sustained by the evidence and also that there was evidence to justify a finding of any other fact at issue necessary to sustain the judgment,[247] and the only question for review is whether the findings of fact justify the conclusions of law. Where the decision is in the now abolished short-form, if there is no case, the judgment will be affirmed though the grounds specified in the decision are insufficient to warrant the judgment.[248]

§ 2808. Scope of review on appeal from final judgment after affirmance of interlocutory judgment.

Where final judgment is taken at a special term or trial term, or pursuant to the directions of a referee, after the affirmance of an interlocutory judgment upon an appeal to the appellate division, or after the refusal, by the appellate division, of a new trial, either upon an application made, in the first instance, at a term of the appellate division or upon an appeal from an order of the special term, or of the judge, before whom the issues or questions of fact were tried by a jury, an appeal to the appellate division from the final judgment brings up, for review, only the proceedings to take the final judgment, or upon which the final judgment was taken, including the hearing or trial of the other issues in the action, if any.[249]

The dismissal of an appeal from an interlocutory judgment is not an "affirmance" within this Code provision, so as to

[247] Tompkins v. Morton Trust Co., 91 App. Div. 274, 278, 86 N. Y. Supp. 520.

[248] Gardner v. New York Mut. Sav. & Loan Ass'n, 67 App. Div. 141, 73 N. Y. Supp. 604.

[249] Code Civ. Proc. § 1350.

preclude a review thereof on appeal from the final judgment where the notice of appeal states that the interlocutory judgment is brought up for review.[250]

§ 2809. Review of discretionary rulings.

Rulings which rest in the discretion of the court at trial or special term, though reviewable by the appellate division, will not be disturbed except in case of clear abuse. This rule is so well settled by a multitude of authorities that a reference thereto is unnecessary.[251] It has been held, however, that where the statute vests discretion in "the supreme court" the appellate division may reverse though the discretion exercised at special term has not been abused, inasmuch as the appellate division is as much a part of the supreme court in which the discretion is vested as is the trial or special term.[252]

§ 2810. Exceptions as necessary to review of question of law.

The necessity of an exception to a ruling on the trial to authorize a review of the ruling by the appellate division has already been considered,[253] as has the necessity of exceptions to conclusions of law or findings of fact in the decision or report where the trial is without a jury.[254] Where an appeal is taken to the appellate division from a judgment entered upon the report of a referee or decision of the court, the facts are before the appellate division, and no exception to the report or decision is necessary to authorize a review of the facts.[255]

[250] McAlear v. Delaney, 19 Wkly. Dig. 252.

[251] To determine what matters are discretionary, consult index under head "Discretion of Court."

[252] Lawson v. Hilton, 89 App. Div. 303, 85 N. Y. Supp. 863.

[253] Volume 2, p. 2368. Necessity of exceptions to judge's charge, see vol. 2, pp. 2342–2344, and see Wright v. Fleischmann, 99 App. Div. 547, 91 N. Y. Supp. 116. Necessity of exception to ruling on motion for directed verdict or nonsuit, see vol. 2, p. 2294.

[254] Volume 2, p. 2388.

[255] Henderson v. Dougherty, 95 App. Div. 346, 88 N. Y. Supp. 665; Matter of Mosher's Estate, 103 App. Div. 459, 93 N. Y. Supp. 123.

§ 2811. Review of sufficiency of evidence.

The rule that a verdict, or a finding of fact by the court or by a referee, will not be disturbed as contrary to the evidence, where the evidence is conflicting, except in cases of palpable mistake, prejudice, passion, or partiality, or unless it is clearly and strongly against the preponderance of evidence, is too well settled to require the citation of authorities.[256] This rule also applies to alleged excessive or inadequate damages. What has been said in a preceding volume as to when a verdict will be set aside as against the weight of evidence, on a motion for a new trial,[257] would seem to be applicable to appeals. No more definite rule can be laid down as to when a verdict is so clearly against the preponderance of the evidence as to authorize a reversal. While it is peculiarly the province of the trial court to determine what weight should be given to the testimony of witnesses, and an appellate court should act with extreme caution in disturbing such finding, nevertheless, where it is clearly apparent that the judgment resulted from a misapprehension of the force and effect of a group of circumstances, an exercise by the appellate court of its well-defined power is called for.[258] A court, in reviewing evidence upon which a verdict is based, is bound to exercise its intelligence, and in doing so must recognize the existence of certain facts as controlled by physical laws. It cannot permit the finding of a jury to change such facts, because to do so would, in effect, destroy the intelligence of the court.[259] Of course, if the evidence shows that plaintiff

[256] The appellate court will not be so reluctant to reverse on conflicting evidence where the evidence is documentary (Lavelle v. Corrignio, 86 Hun, 135, 33 N. Y. Supp. 376; Bigler v. Barnes, 56 N. Y. 654), though where a question of fact arises from inferences from documentary evidence the appellate division will not reverse unless error affirmatively appears. Deuterman v. Gainsborg, 9 App. Div. 151, 41 N. Y. Supp. 185.

[257] Volume 3, pp. 2692–2698.

[258] Rosenbloom v. Cohen, 91 N. Y. Supp. 382.

[259] Quigley v. Naughton, 100 App. Div. 476, 91 N. Y. Supp. 491; Matter of Harriot's Estate, 145 N. Y. 540; Elwood v. Western Union Tel. Co., 45 N. Y. 549; Warner v. Western Transp. Co., 28 Super. Co. (5

should recover either the amount sued for or nothing, a verdict for nominal damages should not be allowed to stand.[260]

The principle that where a case has been tried several times, and upon each occasion with the same result, the appellate court will not disturb the verdict as against the weight of evidence, but will allow it to stand, and affirm the judgment, has no force as applied to a case where the verdict has no evidence at all to support it.[261]

The fact may be taken into consideration that the trial judge has denied a motion for a new trial.[262]

—— **As dependent on motion for nonsuit or directed verdict.** The rule supported by the better reasoning seems to be that a motion for a nonsuit or a directed verdict, at the close of the trial, is not necessary to enable the defeated party to move for a new trial on the ground that the verdict is against the evidence,[263] and that where the motion is denied such question may be raised on an appeal from the order;[264] but that the question whether there is "any" evidence to support the verdict cannot be reviewed unless a motion was made in the trial court, at the close of the trial, for a nonsuit or directed verdict.[265] At any event, it would seem that the omission of proof, where the trial is without a jury, cannot be urged on appeal where no motion to dismiss the complaint was made in the trial court.[266]

Rob.) 490; Colvin v. Brooklyn Heights R. Co., 32 App. Div. 76, 52 N. Y. Supp. 698.

[260] Virgil v. Newmark, 32 Misc. 753, 65 N. Y. Supp. 792.

[261] Sergent v. Liverpool & London & Globe Ins. Co., 96 App. Div. 117, 89 N. Y. Supp. 35.

[262] Cushman v. De Mallie, 46 App. Div. 379, 61 N. Y. Supp. 878.

[263] Shearman v. Henderson, 12 Hun, 170; Picard v. Lang, 3 App. Div. 51, 38 N. Y. Supp. 229.

[264] Citizens' Bank v. Rung Furniture Co., 76 App. Div. 471, 78 N. Y. Supp. 604.

[265] Volume 2, p. 2301.

[266] Conroy v. Boeck, 45 Misc. 625, 91 N. Y. Supp. 80.

ART. IV. APPEALS TO THE SUPREME COURT FROM AN INFERIOR COURT.

§ 2812. Scope of review by appellate division.

Where an appeal is taken to the appellate division of the supreme court from a final judgment rendered by a county court, or by any other court of record possessing original jurisdiction, an order granting or refusing a new trial for any of the causes mentioned in section 999 of the Code, made by any of said courts, and questions of fact may be reviewed in the same manner, and to the same extent as questions of fact may be reviewed, upon appeal to the appellate division of the supreme court from a final judgment and order, granting or refusing a new trial, rendered by the same court.[267] So reads the Code provision. In other words, on an appeal from a final judgment, if the notice of appeal specifies the order for a new trial for review, the appellate division may review the propriety of granting or refusing a new trial on exceptions or because the verdict is against the evidence or is for inadequate or excessive damages. The decision in Hand v. Dorchester, 43 Hun, 33, to the effect that the supreme court could not review an order of the county court granting or refusing a new trial because the verdict was against the weight of evidence, and that of Reilly v. D. & H. Canal Co., 102 N. Y. 383, denying a review because of excessive or insufficient damages, were both overthrown by the amendment of this section of the Code of Civil Procedure in 1888, giving to the appellate division power to review a final judgment of an inferior court, or an order granting or refusing a new trial for any of the causes stated in section 999 of the Code.[268] The appellate division cannot, however, review the granting or refusing of an order for a new trial on the ground of surprise or newly-discovered evidence since they are not grounds for a new trial on the judge's minutes.

[267] Code Civ. Proc. § 1340.
[268] Kilts v. Neahr, 101 App. Div. 317, 91 N. Y. Supp. 945.

§ 2813. Scope of review by appellate term on appeal from city court of New York.

If the appeal is from a final judgment, the scope of review is the same as if the appeal was to the appellate division from a final judgment of the supreme court.[269] If the appeal is from an interlocutory judgment or an order, the appellate term has full power to review any exercise of discretion by the court or judge below.[270] Such is the law as laid down by the Code amendments of 1902 which abolished the general term of the city court of New York and provided for a direct appeal to the supreme court. Prior to the amendment it was held that the supreme court could review only questions of law,[271] but now there is no question but what the review by the supreme court is as broad as that of the appellate division on an appeal from a judgment or order of the supreme court. An appeal from an order denying a new trial on the minutes as well as from the judgment, brings up the whole proceedings at the trial, including remarks made by the trial judge.[272]

ART. V. APPEALS TO APPELLATE DIVISION FROM APPELLATE TERM.

§ 2814. Appeal by leave of court.

Where, by leave, an appeal is taken from the appellate term to the appellate division, the scope of review is not limited by any Code provision and it seems that questions of fact are reviewable as well as questions of law. Of course, the scope of the review is limited to the questions which the appellate term could review. The appellate term, on allowing an appeal to the appellate division, cannot limit the scope of review by certifying questions.[273]

[269] Code Civ. Proc. § 3188.
[270] Code Civ. Proc. § 3189.
[271] Buell v. Hollins, 16 Misc. 551, 38 N. Y. Supp. 879.
[272] Reilly v. Eastman's Co., 28 Misc. 125, 58 N. Y. Supp. 1089.
[273] Bang v. McAvoy, 52 App. Div. 501, 65 N. Y. Supp. 467.

CHAPTER XVII.

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ART. I. GENERAL RULES.

§ 2815. Default judgments.

Judgments of reversal by default will not be allowed. When a cause is called in its order on the calendar, if the ap-

pellant fails to appear and furnish the court with the papers required, and argue or submit his cause, judgment of affirmance by default will be ordered on motion of the respondent. If the appellant only appears he may either argue or submit the cause.[1] This rule applies to appeals to the appellate division as well as to appeals to the court of appeals. This rule was not intended to impose on the judges the duty of acting as counsel for the party who does not appear to prosecute or defend, but to save to parties acting in good faith a further opportunity to present a printed brief, and save the court the loss of time formerly consumed in hearing motions to open defaults.[2] On good cause shown, the default may be opened, on terms such as the payment of a counsel fee and the costs of the term.[3]

In the court of appeals, when any cause shall be regularly called for argument, and no other disposition shall be made thereof, the appeal shall be dismissed without costs, and an order shall be entered accordingly, which shall be absolute unless upon application made and good cause shown, upon notice to the opposite party within ten days, if the court is in session, and if not on the first motion day of the next session, the court shall revoke said order and restore said appeal.[4]

In the appellate division, if neither party appears, the case will be passed and placed at the foot of the calendar. If twice passed the clerk shall enter an order of course dismissing the appeal or the proceedings, but the court may, on motion, vacate the order and restore the cause.[5]

§ 2816. Effect of death of party before decision.

When a party dies after argument but before decision, the

[1] Rule 15 of the court of appeals; Rule 39 of the General Rules of Practice.

[2] Maher v. Carman, 38 N. Y. 25.

[3] Conant v. Vedder, 4 How. Pr. 141.

[4] Rule 15 of court of appeals.

[5] Rule 39 of General Rules of Practice.

order of affirmance may be entered nunc pro tunc as the day of the argument.[6]

§ 2817. Appeal from order or interlocutory judgment.

On appeal from an order, the appellate division may make the order which the lower court should have made,[7] except that on reversing an order denying a motion for want of power in the lower court, the case should be remitted to the lower court to exercise its jurisdiction.[8] If the trial court improperly denied a motion on a question of practice without passing on the merits, the appellate court will not grant the motion but will remit it to be heard on its merits.[9] On reversing an order, if further proof is to be taken, the appellate court ordinarily will remit the proceedings to the lower court.[10] On affirming an order overruling a demurrer it seems that the appellate court has the power to permit the demurrer to be withdrawn and an answer interposed, though the lower court has refused the favor.[11] But where a demurrer is overruled and leave given to withdraw it and plead over, but the demurrant allows judgment to be entered against him, and then appeals, the appellate court will not, on affirmance, grant leave to plead

[6] Bergen v. Wyckoff, 1 Civ. Proc. R. (McCarty) 1.

[7] Knauer v. Globe Mut. Life Ins. Co., 46 Super. Ct. (14 J. & S.) 370; Howard v. Freeman, 30 Super. Ct. (7 Rob.) 25, 42; Bennett v. Lake, 47 N. Y. 93. But the appellate court cannot amend the order so as to state the ground for denying relief, as that the motion was denied for want of power, since to do so would be, in effect, to direct the decision on that particular ground. Hall v. Gilman, 87 App. Div. 248, 84 N. Y. Supp. 279, followed in Davis v. Reflex Camera Co., 99 App. Div. 567, 90 N. Y. Supp. 877.

[8] Hewlett v. Wood, 67 N. Y. 394; Reed v. City of New York, 97 N. Y. 620. See, also, Fox v. Matthiessen, 155 N. Y. 177.

[9] Larkin v. Watson Wagon Co., 68 App. Div. 86, 74 N. Y. Supp. 73.

[10] Matter of Mitchell, 57 App. Div. 22, 67 N. Y. Supp. 961; Ellis v. Salomon, 57 App. Div. 118, 67 N. Y. Supp. 1025.

[11] Piper v. Hoard, 107 N. Y. 73, 84. In this case leave was refused because leave had twice been refused in the supreme court, but leave was granted to apply to the supreme court for such relief.

over.[12] On reversing an order sustaining a demurrer, the appellate court may grant leave to plead over.[13] On appeal from an order denying a motion to open a default, the appellate court may open the default and fix the terms.[14]

§ 2818. Reversal for formal or trivial errors.

A merely formal error which ought to have been amended on the trial, without imposing terms, must be disregarded on appeal.[15] So the court of appeals will not reverse an order of the appellate division dismissing an appeal on the ground that an affirmance would have been technically the more correct practice.[16] Error in failing to show interest which would amount to a trifling sum is too insignificant to furnish ground for reversal.[17]

A reversal and new trial will not be granted to plaintiff merely to enable him to recover nominal damages,[18] except where it appears that a substantial right is in controversy which may be defeated, prejudiced or impaired by a dismissal of the complaint and which may be saved by the recovery of judgment for a nominal sum. If nominal damages will entitle

[12] Whiting v. City of New York, 37 N. Y. 600; Fisher v. Gould, 9 Daly, 144.

[13] Fulton Fire Ins. Co. v. Baldwin, 37 N. Y. 648, 652. Leave should be granted where the demurrer was interposed in good faith and the case is one in which the court below should have granted such leave. Id.

[14] Mechanics' Sav. Bank v. Carman, 5 Wkly. Dig. 28.

[15] Bank of Havana v. Magee, 20 N. Y. 355.

[16] Emmerich v. Hefferan, 97 N. Y. 619.

[17] Hartmann v. Burtis, 65 App. Div. 481, 72 N. Y. Supp. 914.

[18] Hopedale Elec. Co. v. Electric Storage Co., 96 App. Div. 344, 352, 89 N. Y. Supp. 325. Brantingham v. Fay, 1 Johns. Cas. 255; La Rue v. Smith, 153 N. Y. 428; Simis v. McElroy, 160 N. Y. 156; Throckmorton v. Evening Post Pub. Co., 35 App. Div. 396, 54 N. Y. Supp. 887; Hofferberth v. Myers, 71 App. Div. 377, 75 N. Y. Supp. 1116; Rollins v. Bowman Cycle Co., 96 App. Div. 365, 89 N. Y. Supp. 289; Skinner v. Allison, 54 App. Div. 47, 66 N. Y. Supp. 288. See, also, Thomson-Houston Elec. Co. v. Durant Land Imp. Co., 144 N. Y. 34; Rambaut v. Irving Nat. Bank, 42 App. Div. 143, 58 N. Y. Supp. 1056.

the plaintiff to costs,[19] or the costs of a former appeal depend on the result of the trial,[20] a reversal will not be refused because only nominal damages are recoverable.

§ 2819. Reversal in part where all co-parties do not appeal.

If the liability of defendants is not joint, and only a part of them appeal, the reversal will be only as to the appellant.[21] But if the liability is joint, the reversal may extend to the co-party who does not appeal or who has taken a separate appeal.[22]

§ 2820. Reversal in toto where appeal is from only part of judgment or order.

Generally speaking, where an appeal is taken from only a part of a judgment or order, the review is limited to the part appealed from, and the balance of the judgment or order is not affected by the determination of the appellate court. Where an appeal is taken from a distinct and separate portion of a judgment, a new trial may be granted as to that portion only without a reversal of the residue.[23] But a judgment may be reversed in toto though the appeal is only from a part of the judgment where the portions of the judgment are so closely related that if one falls all must fall.[24] So where there has

[19] National Cash Register Co. v. Schmidt, 48 App. Div. 472, 62 N. Y. Supp. 952; Moore v. New York El. R. Co., 4 Misc. 132, 30 Abb N. C. 306, 23 N. Y. Supp. 863.

[20] Goldzier v. Central R. Co. of New Jersey, 90 N. Y. Supp. 435.

[21] Newburgh Sav. Bank v. Town of Woodbury, 64 App. Div. 305, 72 N. Y. Supp. 222. Reversal operates only in favor of appellant. Belden v. Andrews, 14 App. Div. 630, 43 N. Y. Supp. 587.

[22] See Boice v. Jones, 94 N. Y. Supp. 896.

[23] Wilson v. Mechanical Orguinette Co., 170 N. Y. 542, 553.

[24] Electric Boat Co. v. Howey, 96 App. Div. 410, 89 N. Y. Supp. 210. Where a judgment conditionally directed respondent to write out and deposit a chemical formula, and further adjusted the respective interests of respondent and appellants in the capital stock of a corporation, and the judgment was reversed on appeal from that portion thereof which adjusted the interest in the stock of the corporation, it should be

been a series of orders connected with the same matter, so that if one is erroneous all are, all may be reversed on an appeal from one of the orders.[25]

§ 2821. Reversal in part where appeal is from all of judgment.

In an action at law, the rule is that there cannot be an affirmance of one part of a claim and a new trial granted as to another part of the claim, if the judgment is entire.[26] So a new trial cannot be granted as to one defendant and the judgment affirmed as to another if the judgment is entire.[27] On an appeal from a judgment which is entire and against several defendants, the appellate court must either totally affirm or reverse, both as to the recovery and as to all the parties; but in cases where there are separate and distinct judgments, or where an error exists as to a separate claim or defense, which relates only to a transaction between the plaintiff and one of the defendants, the judgment may be reversed as to such a claim or defense, and only as to the parties interested therein, and affirmed as to the remainder.[28] Where there are distinct and separate items, and error, either of fact or law, has been committed on the trial in respect to one or more of the claims embraced in the recovery, the appellate division, if no other error exists, may, instead of reversing the judgment absolutely, reverse it only as to the erroneous items, and affirm it as to the residue, provided the successful party consents to forego his claim to recover them, and the items as to which the error exists are separate and distinguishable from the others.[29]

reversed as a whole, although there was no appeal from the portion directing the deposit of the formula. Hunter Smokeless Powder Co. v. Hunter, 100 App. Div. 191, 91 N. Y. Supp. 620.

[25] Stanton v. King, 76 N. Y. 585.

[26] Wolstenholme v. Wolstenholme File Mfg. Co., 64 N. Y. 272; Cochran v. Reich, 91 Hun, 440, 447, 36 N. Y. Supp. 233.

[27] This rule also applies to suits in equity. Altman v. Hofeller, 152 N. Y. 498, 506.

[28] Altman v. Hofeller. 152 N. Y. 498, 504, and cases cited.

[29] Whitehead v. Kennedy, 69 N. Y. 462, 468.

A reversal and new trial as to some of the defendants and affirmance as to the others is proper only where the interests and the issues between defendants are so far separate that on a new trial the issues between the plaintiff and the defendants as to which it is affirmed will not be involved or determined.[30] This rule also applies to separate and distinct causes of action set forth in the complaint.[31] Where several causes of action are joined and a recovery is had on all against the single defendant, the appellate division cannot affirm the judgment as to one cause of action and reverse it and grant "a new trial" as to the other, since a new trial in a common-law action against a single defendant can be granted only as to the whole action;[32] but where causes of action are joined in the complaint and a recovery had on all, but on appeal it is held that no recovery, under any event, is proper on a part of the causes of action, and the amount claimed on each is definite and can be easily separated from the judgment rendered in gross for the entire sum alleged to be due, the appellate court should not reverse but should modify the judgment by making the proper reduction and affirm it as thus modified.[33] Where plaintiff is nonsuited as to one cause of action and his complaint is dismissed on the merits as to the other cause of action, there may be a reversal and a new trial granted as to the one cause of action though the judgment is affirmed in so far as the second cause is concerned.[34]

§ 2822. Propriety of ordering final judgment.

To justify an appellate court in awarding final judgment, it must appear that the facts upon which the right of recovery rests are undisputed, and cannot be varied upon another trial, or that they are established by official records, or that they

[30] Altman v. Hofeller, 152 N. Y. 498.
[31] Crim v. Starkweather, 88 N. Y. 339.
[32] Goodsell v. Western Union Tel Co., 109 N. Y. 147.
[33] Freel v. County of Queens, 154 N. Y. 661.
[34] Talcott v. Wabash R. Co., 99 App. Div. 239, 90 N. Y. Supp. 1037.

have been specifically found by the jury or trial court.[35] On reversing, a new trial must be granted unless it is apparent, in the very nature of the case, that the party against whom the reversal is pronounced can never succeed in the action,[36] i. e., that no possible state of proof applicable to the issues will entitle him to judgment.[37] The appellate division cannot reverse a finding of fact and modify the judgment in accordance therewith but must order a new trial.[38] If only nominal damages are allowed where substantial damages should have been allowed, a new trial must be ordered.[39] It is proper to reverse and dismiss the complaint where it is plain from the pleadings and the nature of the controversy that the plaintiff cannot succeed because he must resort to another remedy.[40]

A distinction was formerly made in the exercise of the power to order judgment absolute against the respondent on a reversal, between actions at law and suits in equity, as it was held that in the former it should affirmatively appear of inevitable necessity that the party could not succeed on a new trial, and in the latter that it was only necessary that the appellate court should be satisfied that a final judgment would not work injustice;[41] but this distinction no longer exists.[42] On the reversal of a judgment dismissing the complaint after

[35] Griffin v. Marquardt, 17 N. Y. 28; Benedict v. Arnoux, 154 N. Y. 715, 724, 727; Matter of Chapman, 162 N. Y. 456; Dixon v. James, 181 N. Y. 129. For additional cases, see 1 Abb. Cyc. Dig. 645–650.

[36] Schenck v. Dart, 22 N. Y. 420; Mansfield v. City of New York, 165 N. Y. 208; Heerwagen v. Crosstown St. R. Co., 179 N. Y. 99. It is not enough that it is improbable that he may succeed but it must appear that he certainly cannot. Griffin v. Marquardt, 17 N. Y. 28; Foot v. Etna Life Ins. Co., 61 N. Y. 571; New v. Village of New Rochelle, 158 N. Y. 41; Hendrickson v. City of New York, 160 N. Y. 144; Howells v. Hettrick, 160 N. Y. 308.

[37] Edmonston v. McLoud, 16 N. Y. 543.

[38] New York Bank Note Co. v. Hamilton B. N. E. & P. Co., 180 N. Y. 280; Van Beuren v. Wotherspoon, 164 N. Y. 368; Dixon v. James, 181 N. Y. 129.

[39] Andrews v. Tyng, 94 N. Y. 16.

[40] Husted v. Thomson, 158 N. Y. 328, 338.

[41] Muldoon v. Pitt, 54 N. Y. 269.

[42] Benedict v. Arnoux, 154 N. Y. 715, 723.

an order setting aside the verdict for want of jurisdiction, the appellate court may, if the evidence sustains the verdict and no error prejudicial to defendant appears, restore the verdict with leave to plaintiff to enter judgment thereon.[43] If the recovery on a counter-claim is reversed, a new trial need not be ordered since the judgment may be modified by striking out the recovery thereon.[44] The appellate court will not grant a new trial to enable plaintiff to ask for a judgment on a different theory from that presented in the trial court and inconsistent with the case made by the complaint.[45]

A new trial will not be ordered where it would be a useless formality as where the death of defendant has rendered incompetent the only evidence which the plaintiff has to establish his cause of action.[46]

§ 2823. Reversal or modification.

Where the facts are conceded or have been found on the trial and are not in dispute, the appellate court may render the judgment which should have been rendered below.[47] For instance, where the lower court erred in refusing to direct a judgment required by the facts found, the appellate court may correct such error and direct the proper judgment.[48] The appellate court may strike out an unauthorized provision in the judgment or order appealed from though relief could have been obtained by a motion in the lower court.[49] The appellate court may, instead of reversing, modify the form of the judgment,[50] as by inserting a direction for the reformation of a

[43] Strawn v. Edward J. Brandt-Dent Co., 71 App. Div. 234, 75 N. Y. Supp. 698.

[44] Sugden v. Magnolia Metal Co., 58 App. Div. 236, 68 N. Y. Supp. 809.

[45] Third Nat. Bank v. Cornes, 20 Wkly. Dig. 30; Spink v. Co-Operative Fire Ins. Co., 25 App. Div. 484, 490, 49 N. Y. Supp. 730.

[46] Baker v. Lever, 5 Hun, 114.

[47] Wood v. Monroe County Sup'rs, 30 State Rep. 706.

[48] Outwater v. Moore, 124 N. Y. 66.

[49] Hewitt v. Ballard, 16 App. Div. 466, 44 N. Y. Supp. 935.

[50] People v. Richmond County Sup'rs, 28 N. Y. 112; Fitzhugh v. Wiman, 9 N. Y. 559; Little v. Gallus, 39 App. Div. 646, 57 N. Y. Supp.

contract,[51] or by amending the decree to make it conform to the findings of fact and conclusions of law [52] or by changing a dismissal on the merits to a nonsuit,[53] or vice versa.[54]

——**Reducing the recovery.** Where a judgment is too large, and the error on the trial involves simply the amount of recovery, and the effect thereof can be clearly and definitely determined on the evidence before the appellate court, the appellate court, while it cannot itself reduce the damages, may permit the respondent to consent to a reduction to avoid a reversal and a new trial. This rule applies to actions in tort as well as to actions on contract.[55] In other words, if the amount recovered is in excess of that which should have been allowed, and the excess consists of a distinct item or can be definitely ascertained by mere computation, the appellate court may properly modify the judgment by reducing the amount thereof instead of reversing it. For instance, where the facts appear in the decision or report, where the trial is without a jury, or in a special verdict, where the trial is by a jury, the appellate court may rectify an error bearing on the damages by directing the specific amount for which judgment shall be entered, where the damages are severable, and the finding or verdict supplies the data for determining what part of the damages are erroneously awarded. This may be done absolutely without giving a right of election to any of the parties. A different rule prevails, however, where a jury has rendered a general verdict, especially in an action based on a tort where the damages are unliquidated. In such a case, the appellate court cannot absolutely reduce the amount of the recovery to a

104. Judgment for sum of money may be modified by changing it into an interlocutory judgment directing a reference to ascertain the amount due. Gautier v. Douglass Mfg. Co., 13 Hun, 514.

[51] Born v. Schrenkeisen, 110 N. Y. 55.

[52] Livingston v. Manhattan R. Co., 4 App. Div. 165, 38 N. Y. Supp. 751.

[53] Arnold v. Rothschild's Sons Co., 23 App. Div. 221, 48 N. Y. Supp. 854.

[54] Johnson v. Lord, 35 App. Div. 325, 54 N. Y. Supp. 922.

[55] Vail v. Reynolds, 118 N. Y. 297, 303.

fixed sum, though it unquestionably may require the successful party to elect to consent to a reduction of the verdict or suffer a reversal.[56] Usually the appellate court will not remand for a new trial because the verdict is excessive where the items objected to can be stricken out and a judgment rendered for those regarding which no error is shown,[57] especially where the evidence will be the same on a second trial.[58] For instance, an improper allowance of interest does not necessitate a reversal where the respective amounts of principal and interest included in the judgment can be separated.[59] So where a judgment entered on the report of a referee erroneously awards more than nominal damages, it may be modified by reducing the damages.[60] If the action is based on a contract or on an injury to property, and the case is tried by the court or a referee, without a jury, and the items of damage which are improperly awarded clearly appear, together with the amount thereof, the appellate court will not reverse because thereof but will affirm the judgment as reduced.[61] However, it is discretionary with the appellate court, where the judgment is erroneous only in that it is too large, whether to reverse absolutely and order a new trial or affirm on condition that respondent consent to it.[62] So where a judgment is erroneous in permitting a recovery for more than one penalty, whether it shall be reversed or modified so as to permit a single recovery is in the discretion of the appellate court.[63]

There is little, if any, dispute as to the above rules and their application. There has been some question, however, as to

[56] Holmes v. Jones, 121 N. Y. 461, 467; Stemmerman v. Nassau Elec. R. Co., 36 App. Div. 218, 56 N. Y. Supp. 730. See, as contra, Thaule v. Krekeler, 17 Hun, 338.

[57] McGrath v. Third Ave. R. Co., 9 App. Div. 141, 41 N. Y. Supp. 93.

[58] Heerwagen v. Crosstown St. R. Co., 179 N. Y. 99.

[59] Crawford v. Mail & Exp. Pub. Co., 22 App. Div. 54, 47 N. Y. Supp. 747; Cox v. Island Min. Co., 65 App. Div. 508, 516, 73 N. Y. Supp. 69.

[60] Sackett v. Thomas 4 App. Div. 447, 38 N. Y. Supp. 608.

[61] See Garrett v. Wood, 55 App. Div. 281, 67 N. Y. Supp. 122.

[62] See Godfrey v. Moser, 66 N. Y. 250.

[63] Matter of Transfer Penalty Cases, 92 N. Y. Supp. 322.

the power of the appellate court to authorize a reduction of the damages in an action for a personal injury to avoid a reversal. At one time it was held that in an action for a personal tort where the appellate court deemed the damages excessive, it could not make a conditional order reversing the judgment and granting a new trial unless the plaintiff would consent to a reduction of the damages to a specified sum,[64] but such practice is very common now and the power of the appellate court is, it is submitted, unquestioned.[65]

Under the Code provision (now abolished) authorizing a short-form decision or report, on appeal from which the appellate division could "grant to either party the judgment which the facts warrant," it was held that the court could apportion the award made for rental damage in an abutter's action and modify the judgment by deducting the items erroneously allowed.[66]

——**Increasing the recovery.** Where the judgment is too small, and plaintiff appeals, the court may either reverse and order a new trial, or may reverse and order a new trial unless the defendant consents to increase the recovery;[67] but the appellate court cannot itself add to the original judgment a sum which it finds from the evidence to be due plaintiff, where the question in regard thereto is one of fact.[68] Where the trial is by the court without a jury, or by a referee, and the findings of the court justify an increase in the amount of the recovery, the appellate court may modify the judgment by increasing it, but it cannot where there are no findings and the evidence might be materially different on a second trial.[69]

[64] Cassin v. Delany, 38 N. Y. 178.

[65] Whitehead v. Kennedy, 69 N. Y. 462, 469; Kaplan v. Metropolitan St. R. Co., 52 App. Div. 296, 65 N. Y. Supp. 91.

[66] Farrell v. Manhattan R. Co., 43 App. Div. 143, 59 N. Y. Supp. 401. See, also, Lazarus v. Metropolitan El. R. Co., 14 App. Div. 438, 43 N. Y. Supp. 873.

[67] Murphy v. Long, 1 Hilt. 309. In Wappus v. Donelly, 91 N. Y. Supp. 381, the judgment was affirmed on condition that respondent stipulate to waive the costs of the appeal.

[68] Dayton v. Parke 142 N. Y. 391, 398.

[69] Canaday v. Stiger, 35 Super. Ct. (3 J. & S.) 423. See, as contra,

§ 2824. Allowing amendments to avoid reversal.

An amendment of the pleadings will be allowed on appeal to sustain, but never to reverse, the judgment.[70] An amendment will be allowed, however, only where an amendment could have been allowed in the trial court.[71] An amendment may be allowed to conform the pleadings to the facts proved,[72] provided a new cause of action is not introduced;[73] or the appellate court may treat the complaint as amended in the trial court.[74] In support of a judgment, the court, on appeal, may treat pleadings as though they had been amended so as to conform to the proof where it can be done without overruling an exception well taken on the question of variance.[75] Pleadings will not be amended to conform to the proof where the question was presented on the trial and the motion to amend denied.[76] So the appellate division cannot conform the complaint to one of several views of the evidence for the purpose of reversing a judgment which, according to the pleadings and proof, was correct.[77] An addition of interest to the amount of the judgment demanded and recovered may

Kingsley v. City of Brooklyn, 5 Abb. N. C. 1, 35, 36. So held on appeal from court of claims. Hall v. State, 92 App. Div. 96, 100, 87 N. Y. Supp. 338; Sayre v. State, 123 N. Y. 291. Where there is a mere error in a matter of figures and a new trial will not change the result, a judgment may be modified by increasing the amount of the recovery. Goldstein v. Greenberg, 18 Misc. 61, 41 N. Y. Supp. 21; Golde v. Whipple & Co., 7 App. Div. 48, 39 N. Y. Supp. 964; Tolchinsky v. Schiff, 93 N. Y. 1073.

[70] Amherst College v. Ritch, 151 N. Y. 282; Volkening v. De Graaf, 81 N. Y. 268; McGinnis v. City of New York, 6 Daly, 416.

[71] Riker v. Curtis, 10 Misc. 125, 30 N. Y. Supp. 940; Storrs v. Flint, 46 Super. Ct. (14 J. & S.) 498.

[72] Listman v. Hickey, 65 Hun, 8; Meyer v. Fiegel, 34 How. Pr. 434; Flaherty v. Greenman, 7 Daly, 481; Johnson v. City of Albany, 86 App. Div. 567, 572, 83 N. Y. Supp. 1002.

[73] Harris v. Tumbridge, 83 N. Y. 92.

[74] Fallon v. Lawler, 102 N. Y. 228; Foote v. Roberts, 30 Super. Ct. (7 Rob.) 17; Poillon v. Volkenning, 11 Hun, 385; Smith v. Wetmore, 41 App. Div. 290, 58 N. Y. Supp. 402.

[75] Howell v. Grand Trunk R. Co., 92 Hun, 423, 36 N. Y. Supp. 544.

[76] Smith v. City of Auburn, 88 App. Div. 396, 400, 84 N. Y. Supp. 725.

[77] Hodges v. Friedheim, 25 App. Div. 608, 49 N. Y. Supp. 529.

be made and the necessary amendment allowed by the appellate division.[78]

An amendment cannot be allowed in the appellate court to set up the statute of limitations in order to support the judgment,[79] nor can an amendment be allowed where it would require additional parties to be brought in,[80] nor can an amendment as to parties be allowed where it would change the whole theory of the action.[81]

Accidental mistakes in a finding of fact by the trial court may be corrected by the appellate court.[82]

An omission in the order appealed from cannot ordinarily be supplied,[83] though the appellate division may amend its order of reversal nunc pro tunc to show whether the reversal was on questions of law or fact, after an appeal to the court of appeals.[84]

§ 2825. Where both parties appeal.

Where both parties separately appeal from a judgment in favor of plaintiff, there should be but one disposition of the case, and if the court finds prejudicial error it should either reverse the judgment and direct a new trial or order a modification. The appellate court has no power to affirm the judgment as to plaintiff and reverse it as to the defendant and order a new trial.[85]

§ 2826. Incidental relief to unsuccessful party.

Incidental relief is sometimes granted to the unsuccessful party, as by allowing him to sever his action.[86]

[78] Earle v. Gorham Mfg. Co., 2 App. Div. 460, 37 N. Y. Supp. 1037.

[79] Williams v. Willis, 15 Abb. Pr. (N. S.) 11; Dezengremel v. Dezengremel, 24 Hun, 457.

[80] Easterly v. Barber, 66 N. Y. 433.

[81] Bassett v. Fish, 75 N. Y. 303.

[82] Robert v. Corning, 23 Hun, 299.

[83] Cleary v. Christie, 41 Hun, 566.

[84] Judson v. Central V. R. Co., 158 N. Y. 597.

[85] National Board of Marine Underwriters v. National Bank of Republic, 146 N. Y. 64.

[86] Roehr v. Liebmann, 9 App. Div. 247, 41 N. Y. Supp. 489.

§ 2827. Restitution.

The Code provides quite fully for restitution in particular instances after the vacation or reversal of a judgment or order,[87] The Code provision as to restitution on appeals in general is as follows: "When a final judgment or order is reversed or modified, upon appeal, the appellate court, or the general term of the same court, as the case may be, may make or compel restitution of property, or of a right, lost by means of the erroneous judgment or order; but not so as to affect the title of a purchaser in good faith and for value. When property has been sold, the court may compel the value, or the purchase price, to be restored, or deposited to abide the event of the action, as justice requires."[88] The phrase "or the general term of the same court" has no application, it seems, since the abolition of the general term of the city court of New York.[89]

Restitution was a remedy well known to the common law. Its object was to restore to an appellant the specific thing, or its equivalent, of which he had been deprived by the enforcement of the judgment against him during his appeal. It was not created by statute but was exercised by the appellate court as an inherent power. It was usually provided for in the order of reversal by directing "that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid."[90]

It will be noticed that restitution will not be ordered so as to affect the title of a bona fide purchaser for value. If the property sold has been bought in for the benefit of the judgment creditor, by a trustee, the latter is not a bona fide purchaser so as to preclude restitution on motion.[91]

[87] Restitution may be ordered on granting of a new trial by the lower court. Code Civ. Proc. § 1005. Undertaking for restitution where judgment by default after service by publication, see Code Civ. Proc. § 1216. On setting aside judgment, Code Civ. Proc. § 2142. Restitution in summary proceedings, Code Civ. Proc. § 2263. See, also, vol. 1, p. 782.

[88] Code Civ. Proc. § 1323.

[89] See Carlson v. Winterson, 146 N. Y. 345.

[90] Haebler v. Meyers, 132 N. Y. 363, 28 Abb. N. C. 175.

[91] Murray v. Berdell, 98 N. Y. 480.

—— **Power of appellate court as exclusive.** The remedies by motion in the appellate court and by an independent action are concurrent.[92] The motion may be denied without prejudice to the right to bring an action.[93] The Code provision does not negative the authority of the court, at special term, to grant the same relief.[94] If there is a dispute with respect to the identity of the property, the moving party should be left to his remedy by action.[95]

—— **Order as discretionary.** The granting of the motion is said to rest in the discretion of the court[96] which may remit the party to his action.[97] Other cases hold that where the judgment is not reversed on the merits, restitution should not be ordered as a matter of course,[98] but where no new trial is awarded the appellate court "must" order restitution.[99] So it has been held that where a judgment for plaintiff in ejectment is reversed and a new trial ordered, restitution will be ordered as of course.[100]

—— **Propriety of granting.** Restitution will not be ordered where the reversal is on the ground of irregularities, and respondent should again prevail in regularly conducted proceedings.[101] That a new trial has been ordered does not neces-

[92] Haebler v. Myers, 132 N. Y. 363. Action lies to recover moneys paid. Garr v. Martin, 20 N. Y. 306; Scholey v. Halsey, 72 N. Y. 578.

[93] See Wright v. Nostrand, 100 N. Y. 616. Form of complaint in action for restitution, see 28 Abb. N. C. 175.

[94] Platt v. Withington, 25 Abb. N. C. 103, 11 N. Y. Supp. 824. Contra, Hayes v. Nourse, 25 Abb. N. C. 95, 11 N. Y. Supp. 825.

[95] Shapiro v. Goldberg, 31 Misc. 787, 65 N. Y. Supp. 312.

[96] Kroner v. Reilly, 52 App. Div. 624, 65 N. Y. Supp. 1137; Merriam v. Wood & Parker L. Co., 155 N. Y. 136.

[97] Lott v. Swezey, 29 Barb. 87. The court may deny the motion on account of delay and leave the moving party to his action to recover the money. Market Nat. Bank v. Pacific Nat. Bank, 102 N. Y. 464; Carlson v. Winterson, 7 Misc. 689, 28 N. Y. Supp. 20.

[98] Carlson v. Winterson, 7 Misc. 15, 27 N. Y. Supp. 368.

[99] Estus v. Baldwin, 9 How. Proc. 80.

[100] Costar v. Peters, 4 Abb. Pr. (N. S.) 53; Martin v. Rector, 28 Hun, 409.

[101] People v. Hamilton, 15 Abb. Pr. 328.

sarily preclude an order for restitution,[102] but restitution will generally not be ordered where a new trial is granted but appellant's success on the new trial is quite doubtful.[103]

The court cannot, after reversal, direct the restoration of money which was not paid under the order reversed but on the evident responsibility of the person making the payment.[104] Restitution of a pro rata amount paid for a liquor tax certificate will be ordered on reversing an order directing its issuance.[105] Where a final order in summary proceedings against a tenant is reversed on appeal for a jurisdictional defect, the order for reversal should provide for the restitution of the tenant;[106] but a restitution of premises in the actual possession of a tenant who is not a party to the action cannot be ordered.[107] On reversing a judgment in quo warranto proceedings removing defendant from office, it is proper to compel restitution of rights lost by means of the erroneous judgment.[108] Where a sheriff collected a sum under an attachment which was subsequently vacated on motion of subsequent lienors to whom the money was paid by the sheriff, and thereafter the order vacating the attachment was reversed, the attaching creditor, who had in the meantime obtained judgment and issued execution which was returned nulla bona may sue to recover said moneys as for money had and received.[109]

The court may, where a new trial is granted, direct a payment into court of the moneys paid on the reversed judgment instead of ordering payment back to appellant.[110]

The right to a reinstatement of a remedy the order grant-

[102] Murray v. Berdell, 98 N. Y. 480, 485.

[103] Young v. Brush, 18 Abb. Pr. 171; followed in People v. White, 5 Month. Law Bul. 21.

[104] Gillig v. Treadwell Co., 151 N. Y. 552.

[105] People v. Sackett, 15 App. Div. 290, 44 N. Y. Supp. 593.

[106] Bristed v. Harrell, 21 Misc. 93, 46 N. Y. Supp. 966.

[107] Carter v. Anderson, 16 Daly, 437, 11 N. Y. Supp. 883.

[108] People v. Livingston, 80 N. Y. 666.

[109] Haebler v. Myers, 132 N. Y. 363.

[110] Marvin v. Brewster Iron Min. Co., 56 N. Y. 671.

ing which is vacated or reversed is not recognized. A stay on appeal does not suffice.[111]

—— **Extent of relief granted.** Restoration to possession of land is not a complete restitution. Where a judgment for plaintiff in a creditor's suit to reach land fraudulently conveyed was reversed after a sale under the judgment and the bidding in of the property by plaintiff, the appellate court properly ordered restitution of the real estate sold and the value of the rents and profits during the time plaintiff had been in possession, less the amount necessarily paid out by him in connection with his possession of the property. The restitution should not be limited to the rents actually received.[112] After possession is given up, however, the special term may direct a cancellation of the satisfaction of the judgment on which the creditor's suit was based though the rents and profits have not been restored.[113]

On awarding a repayment, interest thereon may be added from the date of payment.[114]

The court has power only to restore in a summary manner the property lost by the particular judgment reversed.[115]

—— **Motion.** It seems that a judgment for restitution cannot be entered without leave.[116] If the court does not, of its own motion, make any provision for restitution in its opinion handed down on reversing or modifying the judgment or order appealed from, the prevailing party may, on notice, move on affidavits for an order directing restitution. The motion should be made in the appellate court, except that where a judgment is set aside by the appellate division and the order of the appellate division is affirmed by the court of appeals,

111 Note in 24 Abb. N. C. 239.

112 Wallace v. Berdell, 101 N. Y. 13.

113 Wallace v. Berdell, 105 N. Y. 7.

114 Platt v. Withington, 25 Abb. N. C. 103, 11 N. Y. Supp. 824.

115 The court cannot interfere summarily to restore property taken under other judgments, even though the effect of the reversal is to decide that the property was taken from the party legally entitled to it. Murray v. Berdell, 98 N. Y. 480.

116 Martin v. Rector, 28 Hun, 409.

the motion should be made at the appellate division.[117] A demand is not necessary before moving for restitution.[118] A judgment of restitution should not be entered without notice to the party to be affected by the order, where it has not been directed by the appellate court in the remittitur.[119] Where an order has been complied with by payment, the appellate court, in modifying the order by reducing the amount to be paid, will not, sua sponte, direct restitution of the excess where the propriety thereof depends on facts outside the record.[120]

—— **Enforcement of order.** In case of inability to comply with the order, it seems that the party may be relieved therefrom.[121] The order for the restitution of money is enforcible by execution and not by contempt proceedings, where it is directed to be paid to a party to the action,[122] though contempt proceedings lie in case of disobedience to the order where the money is directed to be paid into the custody of the court.[123]

—— **Appeal from order.** There is some doubt as to whether the order is in a special proceeding though it would seem that it is an order in the action so as not to be appealable as of right to the court of appeals.[124] At any event, it is not reviewable in the court of appeals in so far as it is discretionary.[125]

§ 2828. Enforcement of judgment affirmed.

"Where a judgment, from which an appeal has been taken, from one court to another, is wholly or partly affirmed, or is modified, upon the appeal, it must be enforced by the court in which it was rendered, to the extent permitted by the determination of the appellate court, as if the appeal therefrom had not been taken."[126] It will be observed that this Code pro-

[117] Market Nat. Bank v. Pacific Nat. Bank, 102 N. Y. 464.
[118] Marshall v. Macy, 10 Abb. N. C. 877.
[119] Young v. Brush, 18 Abb. Pr. 171.
[120] Uhlman v. Uhlman, 51 Super. Ct. (19 J. & S.) 361.
[121] Devlin v. Hinman, 40 App. Div. 101, 108, 57 N. Y. Supp. 663.
[122] O'Gara v. Kearney, 77 N. Y. 423.
[123] Devlin v. Hinman, 40 App. Div. 101, 57 N. Y. Supp. 663. Followed in Kroner v. Reilly, 52 App. Div. 624, 65 N. Y. Supp. 624.
[124, 125] Merriam v. Wood & P. L. Co., 155 N. Y. 136.
[126] Code Civ. Proc. § 1319. This section does not apply to appeals

vision applies where the appeal is "from one court to another." The order of the appellate court cannot be questioned at the special term on an application for its enforcement.[127]

The lower court cannot vacate [128] or amend [129] its judgment or order after its affirmance on appeal, except by consent,[130] or unless the affirmance is expressly stated to be without prejudice to the making of such an application.[131]

——**Motion for new trial after affirmance.** In some cases, a motion for a new trial may be granted at special term after the judgment has been affirmed on appeal.[132]

§ 2829. Noting reversal or modification of money judgment on docket book.

The duty of the clerk of the lower court to make a minute on his docket book of the reversal or modification of a money judgment, after the determination by the appellate division (Code Civ. Proc. § 1321), or after the filing of the remittitur of the court of appeals (Code Civ. Proc. § 1322), has been set forth in volume three of this work.[133]

§ 2830. Effect of reversal.

The effect of a reversal of a judgment for defendant, as reinstating an attachment, has already been considered,[134] as has the effect of a reversal of the order setting aside an attachment.[135] So the effect of a reversal of the judgment on an ex-

from a justice court to the county court. Ryan v. Parr, 40 State Rep. 946.

[127] Matter of Murray's Estate, 6 App. Div. 376, 39 N. Y. Supp. 579.

[128] Village of Herkimer v. New York Cent. & H. R. R. Co., 29 App. Div. 69, 51 N. Y. Supp. 390.

[129] Meldon v. Devlin, 39 App. Div. 581, 57 N. Y. Supp. 670.

[130] Utica Ins. Co. v. Lynch, 2 Barb. Ch. 573.

[131] Lyon v. Merritt, 6 Paige, 473.

[132] See vol. 3, pp. 2730, 2731.

[133] Vol. 3, p. 2806.

[134] Vol. 2, p. 1529.

[135] Vol. 2, p. 1528.

ecution sale has been stated.[135a] A reversal of an order denying a motion to to set aside a stay of proceedings does not, without an order to that effect, set them aside.[136] The reversal of an order invalidates a judgment entered in pursuance thereof.[137]

§ 2831. New trial.

A new trial having been granted by the appellate court, and the order of reversal having been entered in the lower court, either party may give a new notice of trial. In some of the counties a new notice is not necessary and either party may have the cause put on the calendar.[138]

—— **Mode of trial.** If the right to a trial by jury was waived on the first trial, a jury trial cannot be demanded on the second trial.[139]

—— **Amendment of pleadings.** If the complaint is amended on the trial, a subsequent reversal of the judgment there rendered does not, in the absence of a direction to that effect, reverse the order granting the amendment, and a new trial is to be had on the pleadings as amended.[140] An amendment of the pleadings may be allowed,[141] but if the reversal was with costs to abide the event the allowance of the amendment should be conditioned on the payment of the costs of the action subsequent to the service of the original pleading and the costs

[135a] Vol. 3, p. 3133.

[136] Miller v. Adams, 7 Lans. 131.

[137] Raff v. Koster, Bial & Co., 38 App. Div. 336, 56 N. Y. Supp. 997. Rule applied to reversal of order setting aside a default. Weinberg v. Frank, 25 Misc. 788, 56 N. Y. Supp. 920; Cahill v. Lilienthal, 30 Misc. 429, 62 N. Y. Supp. 524; Lerner v. Wagner, 36 Misc. 833, 74 N. Y. Supp. 851.

[138] Vol. 2, p. 1663.

[139] Tracy v. Falvey, 102 App. Div. 585, 92 N. Y. Supp. 625.

[140] Price v. Brown, 112 N. Y. 677.

[141] Alexander Lumber Co. v. Abrahams 20 Misc. 674, 46 N. Y. Supp. 538; Heine v. Rohner, 33 App. Div. 633, 53 N. Y. Supp. 464; Rodgers v. Clement, 58 App. Div. 54, 68 N. Y. Supp. 594; Tradesmen's Nat. Bank v. Curtis, 63 App. Div. 14, 71 N. Y. Supp. 414. Dictum of appellate court is sufficient as basis of amendment to conform thereto. Montgomery v. Boyd, 63 App. Div. 190, 71 N. Y. Supp. 264.

of the appeal.[142] Payment of costs after the service of the notice of trial, including the costs of the appeal, has been required on allowing defendant to amend his answer so as to deny an allegation, the failure to deny which was the ground of reversal, though no costs were imposed on either party on the appeal.[143] Where defendant prevails in the court of appeals on a question as to necessary parties, and a new trial is granted "with costs to abide the event," and thereafter plaintiff moves to amend by bringing in other persons as parties, it is improper, on granting such motion, to impose only motion costs.[144] In the absence of facts showing an excuse for the delay in moving, a motion to amend the answer, after a trial and reversal, by denying an allegation of the complaint admitted by the original answer, will not be granted.[145]

—— **Evidence.** The admissibility of evidence on the new trial is not affected by the reversal except in so far as the rules of law laid down in the opinion of the appellate court apply thereto. If the appellate court has determined that certain facts do not constitute a defense, proof of such facts should be excluded.[146] The appellate court cannot direct, where the reversal is for error on the trial, that on the new trial the testimony taken on the first trial may be read from the minutes, since in such a case the appellant has a right to a new trial without condition or qualification.[147]

—— **Law of the case.** The decision rendered on appeal is the law of the case on a retrial thereof,[148] at least in so far as

[142] Amendment of complaint, Diehl v. Dreyer, 103 App. Div. 590, 93 N. Y. Supp. 151; McEntyre v. Tucker, 40 App. Div. 444, 58 N. Y. Supp. 146; Fox v. Davidson, 40 App. Div. 620, 58 N. Y. Supp. 147.

[143] Rodgers v. Clement, 58 App. Div. 54, 68 N. Y. Supp. 594. See, also, Tradesmen's Nat. Bank v. Curtis, 63 App. Div. 14, 71 N. Y. Supp. 414.

[144] Steinbach v. Prudential Ins. Co., 92 App. Div. 440, 88 N. Y. Supp. 117. In this case, fifty dollars was imposed, as the condition, by the appellate division, but the better practice seems to be laid down in the dissenting opinions of Van Brunt, P. J., and Ingraham, J.

[145] Treadwell v. Clark, 45 Misc. 268, 92 N. Y. Supp. 166.

[146] Waterman v. Shipman, 47 State Rep. 418.

[147] Bruce v. Davenport, 3 Keyes, 472.

[148] Hall v. State, 92 App. Div. 96, 87 N. Y. Supp. 338; Pearsall v.

the evidence is the same.[149] Where the case is sent back for a new trial, nothing said in the appellate court should control the jury in their decision on the facts, especially where new evidence is produced.[150] The lower court should be governed by the principles laid down in the decision of the appellate court, though such principles may not have been drawn in question by the appeal, if they were stated with a view to guiding the further proceedings.[151] Questions appearing on the face of the record, which the court of appeals, in its reversal of the judgment appealed from, does not pass on, but which, if they had substance, would lead to an affirmance, must be regarded, on the new trial ordered by the court, as of no substance.[152] When the court of appeals affirms without an opinion, but without formally adopting the opinion below, it is not to be understood that the affirmance is on grounds substantially different from those taken below. The case cannot be taken from the jury where the appellate court has decided on a former appeal that an issue of fact was raised by the evidence, and the evidence on the new trial is practically the same.[153]

§ 2832. New hearing of motion in the lower court.

The granting of leave by the appellate court to apply to the lower court for specified relief is no indication that such relief

Westcott, 45 App. Div. 34, 60 N. Y. Supp. 816; Bueb v. Geraty, 32 Misc. 720, 66 N. Y. Supp. 285; Buker v. Leighton Lea Ass'n, 63 App. Div. 507, 71 N. Y. Supp. 610. That law laid down on appeal is not the law of the case in the trial court when the decision is plainly erroneous as to the facts in the case, see Reynolds v. Davis, 7 Super. Ct. (5 Sandf.) 267.

[149] Thames Loan & T. Co. v. Hagemeyer, 38 App. Div. 449, 56 N. Y. Supp. 689.

[150] Moore v. American Loan & T. Co., 38 State Rep. 1002.

[151] Huttemeier v. Albro, 15 Super. Ct. (2 Bosw.) 546.

[152] Wehle v. Conner, 45 Super. Ct. (13 J. & S.) 598; Higgins v. Crichton, 98 N. Y. 626.

[153] Bathrick v. Coffin, 28 App. Div. 624, 50 N. Y. Supp. 894; Morman v. Rochester Mach. Screw Co., 53 App. Div. 497, 65 N. Y. Supp. 967; Marshall v. City of Buffalo, 63 App. Div. 603, 71 N. Y. Supp. 719.

should be granted.[154] On reversal of an order where the motion is remitted for a hearing on the merits, new affidavits may be read.[155]

ART. II. APPEAL TO THE COURT OF APPEALS.

§ 2833. Judgment.

In any action in which an appeal has been taken to the court of appeals, the court may in its discretion, either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such judgment as that party may be entitled to.[156] This Code provision means such judgment as a party may be entitled to on the "facts found."[157] The court of appeals has the power to render the judgment the appellate division should have rendered. What has already been said[158] as to the disposition of appeals in general applies equally well to appeals to the court of appeals, except where a stipulation for judgment absolute has been given.

—— **On stipulation for judgment absolute.** If the appeal is from an order granting a new trial on exceptions and the order is affirmed, the court of appeals "must render judgment absolute on the right of the appellant," as authorized by the stipulation for judgment absolute.[159] The statute is mandatory and leaves the court no alternative on affirmance but to order judgment absolute against the appellant,[160] though the court can see that the appellant was entitled to part of the relief granted

[154] Cratlos v. Metropolitan St. R. Co., 67 App. Div. 459, 73 N. Y. Supp. 981.

[155] Sinnit v. Cambridge Val. A. S. & S. Ass'n, 27 Misc. 586, 58 N. Y. Supp. 238.

[156] Code Civ. Proc. § 1337.

[157] Farleigh v. Cadman, 159 N. Y. 169, 175.

[158] Ante, §§ 2815–2832.

[159] Code Civ. Proc. § 194.

[160] Bank of China v. Morse, 168 N. Y. 458, 482; Monitor Milk Pan Co. v. Remington, 109 N. Y. 143. Judgment must be entered in favor of the successful party on all the issues in the action. Wilson v. Palmer, 11 Hun, 325.

by the judgment,[161] except that the stipulation does not prevent the court of appeals from awarding a judgment of modification and affirmance which should have been rendered by the appellate division instead of reversing.[162] It is only where the error which might have justified a reversal of the judgment was merely incidental and capable of accurate correction, so that the judgment should have been corrected below without awarding a new trial, that the court of appeals may modify the judgment by correcting the error. If the order is affirmed, the judgment must be absolute against the appellants on the whole matter and right in controversy in the action.[163] Where the plaintiff appeals from an order granting a new trial on exceptions and the order is affirmed, the defendants are entitled to a judgment on their counter-claim.[164] But where defendant appeals and stipulates for judgment absolute, and the order granting a new trial is affirmed, the defendant is not entitled, in the lower court, to affirmative relief on his counterclaim.[165]

The ordering part of the order of affirmance is as follows: "Order and adjudge that the order of the appellate division of the supreme court appealed from herein to this court be, and the same is, hereby affirmed, and judgment absolute ordered against the defendant, on the stipulation [with costs]."

—— **On appeal from order granting a new trial on the facts.** Usually the appeal is dismissed but sometimes it is deemed better to affirm and grant judgment absolute.[166]

[161] Conklin v. Snider, 104 N. Y. 641. So held where the evidence justified a recovery of a less sum than the whole amount recovered. Gray v. Tompkins County Sup'rs, 92 N. Y. 603.

[162] Freel v. Queens County, 154 N. Y. 661. See, also, Goodsell v. Western Union Tel. Co., 109 N. Y. 147.

[163] Godfrey v. Moser, 66 N. Y. 250; Hiscock v. Harris, 80 N. Y. 402; Wilber v. Sisson, 54 N. Y. 121.

[164] Hiscock v. Harris, 80 N. Y. 402. This rule does not apply, however, where a counterclaim is unauthorized. People v. Dennison, 84 N. Y. 272.

[165] Rust v. Hauselt, 8 Abb. N. C. 148.

[166] See ante c. 15. Affirmance, see Boyle v. New York, L. E. & W. R. Co., 115 N. Y. 636.

§ 2834. Remittitur.

The judgment or order of the court of appeals must be remitted to the court below, to be enforced according to law.[167] A remittitur is necessary whenever any order is made which finally disposes of the appeal, though it may not be an order on the merits.[168] It follows that a remittitur is necessary even when the appeal is dismissed.[169] Where an appeal has been determined in the court of appeals, the remittitur is filed and an ex parte motion made that the judgment of the court of appeals be made the judgment of the supreme, or other, court where the judgment was originally entered. When this motion is granted and the judgment entered in the lower court, the lower court may proceed to enforce the judgment so entered or, if a new trial was granted, may proceed to a new trial.

—— **Form and contents.** The remittitur shall contain a copy of the judgment of the court of appeals and the return made by the clerk below, and shall be sealed with the seal and signed by the clerk of the court of appeals.[170]

—— **Filing.** The remittitur is usually sent by the clerk of the court of appeals to the attorney for the successful party who moves at special term that the judgment of the court of appeals be made the judgment of the lower court. It would seem the better practice to give notice of the filing and of the motion. The order is granted as of course. The fact that the clerk takes the paper into his hands but immediately hands it back does not constitute a filing.[171] The cases do not entirely agree as to the effect of a failure to file the remittitur. On the one hand, it is held that after a remittitur has been issued and delivered to the prevailing party the lower court has jurisdiction of the cause so that, where a new trial has been awarded, it may proceed with the trial, though the re-

167 Code Civ. Proc. § 194. Procedure in lower court after remitting order for judgment absolute, see vol. 3, p. 2867.

168 Dresser v. Brooks, 2 N. Y. (2 Comst.) 559.

169 Dresser v. Brooks, 2 N. Y. (2 Comst.) 559; McFarlan v. Watson, 4 How. Pr. 128, as corrected in 4 How. Pr. 184.

170 Rule 16 of the court of appeals.

171 Cushman v. Hadfield, 15 Abb. Pr. (N. S.) 109, 114.

mittitur has not been filed;[172] and that, in any event, failure to file the remittitur is not a fatal objection to proceedings on a new trial where the party to whom it was delivered to be filed does not raise the objection until the trial is nearly concluded.[173] So it is held that the omission to enter an order making the judgment of the court of appeals that of the supreme court is a formal irregularity which the court can at any time correct by directing the order to be entered nunc pro tunc.[174] On the other hand, it is held that an order or judgment must be entered in the lower court, on filing the remittitur, before execution can issue or other proceedings be taken to enforce the order of the court of appeals as contained in the remittitur.[175]

"When a judgment or order is affirmed by the default of the appellant, the remittitur shall not be sent to the court below, unless the court of appeals shall otherwise direct, until ten days after notice of the affirmance shall have been served on the attorney for the appellant. Service of the notice shall be proved to the clerk by affidavit, or by the written admission of the attorney on whom it was served."[176] The object of this rule is to give the appellant time to make the application to open the default, before the filing of the remittitur.[177]

—— **Staying the filing.** Any judge of the court of appeals may order the filing of a remittitur to be stayed, in whosoever hands it may be, at any time before it is actually filed in the court below, though the motion is not accompanied by motion papers or notice of motion.[178] The filing is often stayed where a reargument is to be applied for.[179] The supreme court will not order the filing of the remittitur to be stayed merely be-

172, 173 Judson v. Gray, 17 How. Pr. 289.

174 Chautauqua County Bank v. White, 23 N. Y. 347.

175 Seacord v. Morgan, 17 How. Pr. 394. Order for entry must be made by supreme court. Id.

176 Rule 17 of the court of appeals; Lyme v. Ward, 1 N. Y. (1 Comst.) 531.

177 Latson v. Wallace, 9 How. Pr. 334.

178 Cushman v. Hadfield, 15 Abb. Pr. (N. S.) 109, which construes rule 16 of the court of appeals as inapplicable.

179 See ante, § 2761.

cause it is shown that a reargument is to be applied for, and the grounds, but where a judge of the court of appeals has granted an order to show cause why a reargument should not be had and directed that in the meantime the remittitur be stayed if not sent down the court below may stay the filing of the remittitur pending the application to the court of appeals.[180] The restriction imposed by section 775 of the Code on the power of a judge out of court to stay proceedings for more than twenty days, except on notice, does not apply to a stay for the purpose of a motion for reargument of an appeal.[181]

—— **Judgment or order entered on.** The judgment or order entered on a remittitur must conform strictly to the remittitur,[182] and it seems that it cannot afterwards be set aside [183] or modified [184] by the lower court, except as directed by the court of appeals. The judgment of the court of appeals must be made the judgment of the lower court.[185] The supreme court cannot add any new and independent direction to the judgment of the court of appeals beyond what may be required to carry that judgment into effect. It cannot add to the judgment contained in the remittitur a new or further judgment, even for costs of the appeal to that court.[186] Where the case is remanded by the court of appeals for the sole purpose of carrying out its judgment, the trial court has no power to award a separate bill of costs to each appellant where the court of appeals has taxed costs to appellants, or to grant an extra allowance.[187] A judgment entered in conformity with

[180] Jarvis v. Shaw, 16 Abb. Pr. 415.

[181] Franklin Bank Note Co. v. Mackey, 158 N. Y. 683.

[182] Zapf v. Carter, 90 App. Div. 407, 86 N. Y. Supp. 175; Parrish v. Parrish, 87 App. Div. 430, 84 N. Y. Supp. 506; Matter of Hopkins' Will 95 App. Div. 57, 87 N. Y. Supp. 793.

[183] Clark v. Mackin, 34 Hun, 345.

[184] Sheridan v. Andrews, 80 N. Y. 648.

[185] Murray v. Jones, 18 State Rep. 916, 2 N. Y. Supp. 486.

[186] McGregor v. Buell, 1 Keyes, 153. Lower court may render judgment for costs as directed in the remittitur. Lumbard v. Syracuse, B. & N. Y. R. Co., 62 N. Y. 290.

[187] Hascall v. King, 54 App. Div. 441, 66 N. Y. Supp. 1112. So held

the remittitur from the court of appeals cannot be treated as irregular in the court below by reason of any objection which might have been raised in the appellate court.[188] On a dismissal of an appeal, the judgment entered on the remittitur is usually the same as in case of an affirmance.[189] Matters of surplusage in the order entered in the lower court on the filing of the remittitur are not fatal.[190]

No "judgment" can be entered on the remittitur of the order of the court of appeals after its reversal of an order or interlocutory judgment.[191]

After judgment is entered on the remittitur, such judgment is not appealable to the court of appeals, since that court can review only "actual determinations" of the lower court.[192]

Where plaintiff recovered on only one of two causes of action set forth in the complaint and, on motion of defendant, his costs were set-off against plaintiff's and judgment entered for plaintiff for the balance only, and on appeal the judgment against defendant was reversed, the court below had power to thereafter correct the original judgment nunc pro tunc so as to award each party costs as adjusted.[193]

——Form of order for judgment.

[Title of cause.] [At a ——— term of the supreme court, etc.]

The above-mentioned ——— having appealed to the court of appeals from the judgment of the appellate division of this court, ——— department, entered on the ——— day of ———, 190—, in the office of the clerk of ——— county, and the court of appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed, and judgment entered for the ———, with costs, and the remittitur from the court of appeals having been filed in the office of the clerk of ——— county; now, on motion of ———, attorney for ———,

as to separate bill of costs in Isola v. Weber, 12 App. Div. 267, 42 N. Y. Supp. 615.

188 Griswold v. Havens, 16 Abb. Pr. 413, 26 How. Pr. 170.

189 Union India Rubber Co. v. Babcock, 11 Super. Ct. (4 Duer) 620. Form of judgment as approved by justices, see Id. 624, 625.

190 Matter of Hopkins' Will, 95 App. Div. 57, 87 N. Y. Supp. 793.

191 Brown v. Lehigh, 50 N. Y. 427.

192 Wilkins v. Earle, 46 N. Y. 358.

193 Genet v. Delaware & H. Canal Co., 136 N. Y. 217.

It is ordered that the said judgment of the court of appeals be, and the same hereby is, made the judgment of this court; and that the judgment entered herein on the ——— day of ———, 190—, be, and the same hereby is, affirmed, and that a judgment of this court be entered herein affirming said judgment with costs of said appeal to be taxed against ———.

—— Form of judgment of affirmance.

[Caption.]

The above-named ——— having appealed to the court of appeals from a judgment of the appellate division of this court, ——— department, entered in this action on the ——— day of ———, 190—, affirming the judgment entered therein on the ——— day of ———, 190—, in the office of the clerk of ——— county, and the court of appeals having heard said appeal, and ordered and adjudged that the judgment so appealed from be affirmed and judgment rendered for ———, with costs, and the remittitur from the court of appeals having been filed in the office of the clerk of ——— county, and an order having been entered thereon making the judgment of the court of appeals the judgment of this court, and directing the entry of a judgment of affirmance herein with costs of said appeal to be taxed against ———,

Now, on motion of ———, attorney for ———:

It is adjudged that the judgment in this action entered on the ——— day of ———, 190—, be, and the same hereby is, affirmed, and that ——— recover of ——— the sum of ——— dollars, the amount of his costs herein as taxed.

—— Effect as divesting jurisdiction. The court of appeals does not lose jurisdiction "until the remittitur has been filed in the court below and that court has taken some action thereon."[194] Furthermore, if the remittitur has been "irregularly" filed in the court below, the court of appeals does not lose jurisdiction of the case, but may require the remittitur to be corrected and made to conform to the decision actually made by the court of appeals.[195]

When the remittitur is returned to the court of appeals, that court is reinvested with jurisdiction. The resumption by the court of appeals of its jurisdiction of the appeal, where the re-

[194] People ex rel. Smith v. Village of Nelliston, 79 N. Y. 638.

[195] Palmer v. Lawrence, 5 N. Y. (1 Seld.) 455; McFarland v. Watson, 4 How. Pr. 128.

mittitur is returned after it is filed in the lower court and an order entered thereon, simply suspends proceedings in the lower court, and where the judgment is not changed by the court of appeals, the judgment entered on the first remittitur will not be set aside.[196]

——**Amendment.** If the remittitur is erroneous in any respect, the remedy is by an application to the court of appeals to amend it.[197] An unnecessary amendment of the remittitur will not be allowed.[198] The remittitur will not be amended to show the grounds of the decision because an appeal is to be taken to the federal supreme court, since an authenticated copy of the opinion can be obtained to be transmitted with the record.[199]

——**Return of.** Having lost jurisdiction, the court of appeals must request a return of the remittitur before it can resume jurisdiction.[200] Even after the remittitur is filed in the court below and an order entered thereon, a judge of the court of appeals may make an order to show cause why a return of the remittitur should not be requested and a reargument granted, with a stay of proceedings in the meantime.[201] No good reason is apparent why the lower court should not have the power to order the remittitur returned for correction without an order of the court of appeals therefor, but the cases hold that after a remittitur has been actually filed, and an order entered to carry into effect the judgment of the appellate court, the order will not be vacated, and the remittitur returned to the court of appeals, without a direction therefor from the court of appeals.[202] Where the court of appeals has not in any way indicated its desire or willingness that the re-

[196] Sweet v. Mowry, 138 N. Y. 650.

[197] Zapf v. Carter, 90 App. Div. 407, 86 N. Y. Supp. 175; Matter of Ingraham, 64 N. Y. 310, 315.

[198] Sweet v. City of Syracuse, 49 State Rep. 262, 20 N. Y. Supp. 924.

[199] People ex rel. Schurz v. Cook, 111 N. Y. 688.

[200] Bliss v. Hoggson, 84 N. Y. 667.

[201] Franklin Bank Note Co. v. Mackey, 158 N. Y. 683.

[202] Selden v. Vermilya, 5 Super. Ct. (3 Sandf.) 683, followed in Bogardus v. Rosendale Mfg. Co., 8 Super. Ct. (1 Duer) 592.

mittitur should be returned, it will not be returned merely because the attorney of the defeated party desires to apply for a reargument unless grounds for a reargument are shown.[203] The purpose of recalling the remittitur is either to amend it or to allow a reargument. A motion to have the remittitur recalled will not be granted where the amendment sought would not benefit the moving party.[204]

§ 2835. Assessment of damages in lower court.

After the affirmance of an order granting a new trial, on a case or exceptions, and the rendition of judgment absolute, "an assessment of damages, or any other proceeding necessary to render the judgment effectual," may be had in the lower court.[205] Inasmuch as the effect of the entry of a judgment absolute in accordance with the stipulation is the same as where defendant makes default in pleading, so that the sole question left is as to the amount of the plaintiff's damages,[206] it follows that an amendment of the complaint will not be allowed, after entry of judgment absolute, by setting up an element of damages not alleged in the original complaint, except on terms such as that all proceedings after the service of the original complaint be set aside, that plaintiff be required to serve his amended complaint and that defendant have leave to answer it, and that plaintiff pay all costs from the time of the service of the original complaint.[207] The successful party is entitled to whatever judgment he could have obtained on

[203] Hillyer v. Vandewater, 25 Abb. N. C. 137, 11 N. Y. Supp. 167.

[204] National Shoe & Leather Bank v. Mechanics' Nat. Bank, 89 N. Y. 467.

[205] See vol. 3, pp. 2867, 2868.

[206] Bossout v. Rome, W. & O. R. Co., 131 N. Y. 37; Hanover Nat. Bank v. American Dock & Trust Co., 14 App. Div. 255, 43 N. Y. Supp. 544; Wood v. New York Cent. & H. R. R. Co., 100 App. Div. 226, 91 N. Y. Supp. 788; Thompson v. Lumley, 7 Daly, 74. The right of recovery cannot be determined. City Trust, Safe Deposit & Surety Co. v. American Brewing Co., 182 N. Y. 285.

[207] Wood v. New York Cent. & H. R. R. Co., 100 App. Div. 226, 91 N. Y. Supp. 788.

the new trial ordered by the appellate division.[208] Where the court of appeals affirms on a stipulation for judgment absolute, the lower court is not necessarily deprived of all discretion as to the form and scope of the judgment. For instance, where an action was brought to compel the removal of a nuisance or for money relief, and judgment absolute was ordered in favor of the plaintiff, it was held that the character of the judgment was not determined.[209]

ART. III. APPEALS TO APPELLATE DIVISION FROM TRIAL OR SPECIAL TERM.

§ 2836. Disposition of appeal.

The general rules already laid down [210] as to the relief which may be granted by an appellate court apply equally well to the appellate division of the supreme court.

On an appeal from a judgment or an order, the appellate division, or the general term to which the appeal is taken,[211] "may reverse or affirm, wholly or partly, or may modify, the judgment or order appealed from, and each interlocutory judgment or intermediate order, which it is authorized to review, as specified in the notice of appeal, and as to any or all of the parties, and it may, if necessary or proper, grant a new trial or hearing."[212]

This Code provision does not increase the powers of the appellate division but is merely declaratory of its inherent power.[213] The appellate division cannot appoint a referee to

[208] Maloney v. Nelson 16 Misc. 474, 478, 39 N. Y. Supp. 930.

[209] Bates v. Holbrook, 171 N. Y. 688.

[210] See ante, art. 1.

[211] It is submitted that the clause "general term to which the appeal is taken" has no place in the provision since the abolition of the general term of the city court of New York.

[212] Code Civ. Proc. § 1317. This provision does not apply to appeals from justice's judgments. Richardson v. Levi, 69 Hun, 432, 436, 22 N. Y. Supp. 352.

[213] Goodsell v. Western Union Tel. Co., 109 N. Y. 147.

take proof and report it to the special term and then direct that a final judgment shall be entered thereon.[214]

Section 993 of the Code provides that the appellate division shall, on appeal from a judgment entered on the report of a referee, or the decision of a court on a trial without a jury, review all questions of fact and of law, and may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party the judgment which the facts warrant.[215]

It has been held that the court has no power to affirm the "judgment" on an appeal only from an order denying a new trial.[216]

——**Appeal from nonsuit or verdict directed after issues submitted to jury.** On an appeal from the judgment entered on a nonsuit or general verdict directed after the submission of issues to the jury, as provided for by section 1187 of the Code, "the appellate division may direct such judgment thereon as either party may be entitled to."[217] Section 1187 should be read in connection with section 1317, and where special questions have been submitted to and answered by the jury, and a verdict has thereupon been directed by the court, the appellate division, on an appeal from the judgment, may either direct a judgment in favor of either party or under section 1317 grant a new trial.[218] A new trial may be ordered instead of reinstating the verdict.[219]

[214] Van Beuren v. Wotherspoon, 164 N. Y. 368.

[215] It would seem that the phrase "the judgment which the facts warrant" refers to the conceded or undisputed facts or those found by the trial court. See Snyder v. Seeman, 157 N. Y. 449, which so held in connection with a like clause, now abolished, in section 1022 of the Code.

[216] Miller v. Eagle L. & H. Ins. Co., 3 E. D. Smith 184.

[217] Code Civ. Proc. § 1187. This section does not apply where the verdict is a general verdict. True v. Lehigh Val. R. Co., 22 App. Div. 588, 593, 48 N. Y. Supp. 86.

[218] Sullivan v. Metropolitan St. R. Co., 37 App. Div. 491, 493, 56 N. Y. Supp. 88.

[219] Howell v. New York Cent. & H. H. R. Co., 68 App. Div. 409.

§ 2837. Contents of judgment or order.

In the appellate division, "a judgment, affirming wholly or partly a judgment, from which an appeal has been taken, shall not, expressly and in terms, award to the respondent a sum of money or other relief which was awarded to him by the judgment so affirmed."[220] The judgment of affirmance should not include the general costs of the action but only the costs of the appeal.[221]

Care should be taken to see that the order of reversal by the appellate division shows the grounds of the decision, since the scope of the review on an appeal to the court of appeals may be affected by the omission of the grounds.[222] The successful party, on an appeal to the appellate division from a judgment entered on a trial without a jury, should be careful to see to it, where the reversal is wholly or partially on the facts, that the order of reversal so states, in order to cut off, so far as possible, a further review of the case by the court of appeals; but if the appellate division reverses a judgment and an order denying a new trial, "after a jury trial," wholly on the law, the defeated party should see to it that the order of reversal so states, if he desires to appeal to the court of appeals. In the one case, the court of appeals, in the absence of a showing, will presume that the reversal was on the law, and hence the successful party should insert the clause in the order of reversal; in the other case, there is no presumption, and the appeal will be dismissed if it is not shown that the reversal is not based wholly or partially on questions of fact.[223] A certificate cannot take the place of a statement "in the record body of the

[220] Code Civ. Proc. § 1317. It would seem that this Code provision is intended to apply only to appeals to the appellate division, since the abolition of the general term of the city court of New York, but no reason is apparent why the rule should not also apply to appeals to the court of appeals.

[221] Beardsley Scythe Co. v. Foster, 36 N. Y. 561, 567; Halsey v. Flint 15 Abb. Pr. 367.

[222] Queen v. Weaver, 166 N. Y. 398.

[223] See ante, §§ 2779, 2780.

judgment or order appealed from."[224] So an order reversing and granting a new trial on the grounds stated in the opinion "delivered herein and which is hereby made a part of the report" cannot be considered as a statement that the reversal was on the facts,[225] though it has been held that where questions of law are certified for review and the certificate expressly refers to the opinion of the appellate division it may be considered.[226]

—— Form of order of affirmance.

[Title of cause] [At a term of the appellate division, etc.,]

The plaintiff (or "defendant") above-named having appealed to the ——— from ———, and the appeal having been heard at this term, now, on motion of ———, attorney for the respondent, and after hearing ——— in behalf of the appellant;

It is (unanimously) ordered that the judgment entered in this action in the office of the clerk of the county of ——— be, and the same hereby is, affirmed in all things, with costs of said appeal to the appellant.

—— Form of judgment of affirmance.

[Title of court and cause.]

The plaintiff (or "defendant") above-named having appealed to the ———, from the judgment entered in this action on the ——— day of ———, 190—, in the office of the clerk of ——— county, and the appeal having been heard at a term of the appellate division of the supreme court, ——— department, held at ———, on the ——— day of ———, 190—, and an order of said appellate division having been made and entered, affirming said judgment with costs of said appeal to the respondent, all the justices concurring,

Now, on motion of ———, attorney for the respondent:

It is hereby adjudged that the said judgment be, and the same hereby is, affirmed in all things, and that ———, the respondent herein, recover of ———, the appellant herein, the sum of ——— dollars, costs of said appeal, and that he have execution therefor.

[Date.] [Signature of clerk.]

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[224] Matter of Laudy, 148 N. Y. 403.

[225] Townsend v. Bell, 167 N. Y. 463. See, also, Koehler v. Hughes, 148 N. Y. 507.

[226] Pringle v. Long Island R. Co., 157 N. Y. 100.

—— Form of order on reversal.

[Title of cause.] [At a term of the appellate division, etc.]

The plaintiff (or "defendant") above named having appealed to ——— from ———, and the appeal having been heard at this term, now, on motion of ———, attorney for appellant, and after hearing ———, attorney for respondent;

It is ordered that the judgment entered in this action on the ——— day of ———, 190—, in the office of the clerk of ——— county be, and the same hereby is, wholly reversed on questions of law only [227] [and a new trial ordered with costs to abide the event].[228]

—— Form of judgment of reversal.

[Title of court and cause.]

The plaintiff (or "defendant") above named having appealed from the judgment entered in this action on the ——— day of ———, 190—, in the office of the clerk of ——— county, and the appeal having been heard at a term of the appellate division of the supreme court, ——— department, held at ———, on the ——— day of ———, 190—, and an order of said appellate division made, reversing said judgment [and ordering a new trial with costs to abide the event];

Now, on motion of ———, attorney for the appellant,

It is hereby adjudged that the judgment entered in this action on the ——— day of ———, 190—, in the office of the clerk of ——— county, be, and the same hereby is, reversed [on questions of law only], [and that a new trial of said action be had in this court]; and that [insert direction as to costs].

—— Amendment. The appellate division has power, even after sending down its remittitur of an order of reversal and while an appeal therefrom is pending in the court of appeals, to amend the order by inserting a statement that the reversal was on a question of fact, and the exercise of that power is not reviewable by the court of appeals,[229] but the order cannot be amended after an appeal therefrom has been determined by

[227] Or "on questions of fact only" or "both on questions of law and questions of fact." It is oftentimes very important that this clause be contained in the order, where an appeal is taken to the court of appeals.

[228] The decision should be closely followed in framing the order.

[229] Matter of Health Dept., 159 N. Y. 245. Order as amended may be attached to the return. Ross v. Gleason, 111 N. Y. 683.

the court of appeals.[230] The order of reversal may be amended by stating the grounds, though only one of the original justices who heard and decided the appeal was present when the amendment was made.[231]

—— **Resettlement.** If the order of affirmance or reversal does not conform to the decision, a motion to resettle it should be made at the appellate division.[232]

§ 2838. Entry of order made on appeal and subsequent procedure.

The order made on the appeal must be entered in the office of the clerk of the appellate division, and a certified copy thereof with the original case or papers on which the appeal was heard, filed as provided in section 1353 of the Code, must be transmitted by the clerk, on payment of his fees, to the clerk of the county where the judgment or order appealed from was entered, and upon such certified copy of the order and the case or papers on which the appeal was heard, the county clerk shall enter the judgment in his office.[233]

After the decision of an appeal to the appellate division from a judgment of a trial or special term of the supreme court, and the transmitting of a certified copy of the order of the appellate division, judgment is entered in the lower court by the clerk, on the application of the successful party. Notice of the application need not be given. The terms of the judgment are fixed on the settlement of the appellate division order. Costs are adjusted precisely the same as when judgment is entered after a determination of the trial court.

—— **Necessity that judgment be entered.** Except where a new trial is granted, a judgment must always be entered by

230 Whitman v. Foley, 40 State Rep. 721, 16 N. Y. Supp. 23.

231 Buckingham v. Dickinson, 54 N. Y. 682.

232 Martine v. Huyler, 34 State Rep. 326, 12 N. Y. Supp. 66.

233 Code Civ. Proc. § 1355. In the second and fourth departments there is a rule that "the remittitur to be transmitted pursuant to section 1355 of the Code shall contain a copy of the judgment or order of this court, and the record which has been filed with the clerk, and shall be sealed with the seal and signed by the clerk of this court."

the county clerk. For instance, it is not sufficient, after a conditional affirmance by the appellate division, to file the required stipulation and the decision of the appellate division, but a formal judgment of affirmance must be entered.[234]

—— **Stay of proceedings after entry of judgment.** Where judgment is entered on a decision of the appellate division, the proceedings on the part of the successful party may be stayed by an order made at special term until the determination of an appeal taken to the court of appeals.[235]

§ 2839. Judgment roll where appellate division affirms.

Where judgment of affirmance is rendered on the appeal, the judgment roll consists of a copy of the judgment, annexed to the papers on which the appeal was heard. Where subsequent proceedings are taken at the trial or special term before the entry of final judgment, the roll must also contain the proper papers relating thereto.[236]

§ 2840. Applications to appellate division after determination of appeal by the court of appeals.

After a dismissal of the appeal by the court of appeals, the appellate division will not allow amended exceptions to the findings of the trial court.[237]

ART. IV. APPEAL TO SUPREME COURT FROM AN INFERIOR COURT.

§ 2841. General considerations.

There is nothing relating to the judgment or order which may be entered on an appeal to the supreme court from an inferior court which does not also apply to the judgment or

[234] Knapp v. Roche, 82 N. Y. 366.
[235] Gray v. Green, 14 Hun, 18.
[236] Code Civ. Proc. § 1354.
[237] Drake v. New York Iron Mine, 38 App. Div. 71, 55 N. Y. Supp. 920.

order entered on any other appeal considered in this chapter, except as set forth in the following section.

§ 2842. Judgment or order.

A judgment or order of the appellate division rendered on an appeal from an inferior court must be entered in the office of the clerk of the appellate division in the department in which the court below is located. A certified copy thereof annexed to the papers transmitted from the court below must be transmitted by the clerk, on payment of his fees, to the clerk of the county where the court from which the appeal was taken is situated, and shall constitute the judgment roll and remain in his office.[238]

The filing of the judgment roll or the entry of the order is a sufficient authority for any proceedings in the court below or before the judge or justice who made the order appealed from, which the judgment or order of the appellate court directs or permits. But where the execution of the judgment or order of the appellate court is stayed by an appeal to the court of appeals, the proceedings in the court below or before the judge or justice who made the order are stayed in like manner.[239]

—— **Appeals from city courts of New York or Buffalo.** A judgment or order of the supreme court, rendered on an appeal from a judgment of any district court or of the city court of New York, or an appeal formerly heard by the superior court of Buffalo, must be entered in the office of the clerk of the county wherein the court below is located, and, with the papers transmitted from the court below, forms the judgment roll which must be filed in the same office. Where the appeal is from the city court of New York, the judgment or order of the supreme court must be entered in the office of the clerk of the said [supreme] court.[240]

[238] Code Civ. Proc. § 1345. Authorizes entry of judgment in county court on order of reversal by appellate division. Short v. Scutt, 57 N. Y. Supp. 393.

[239] Id.

[240] Id.

——**Appeals from final orders in special proceedings.** Where a final order made in a special proceeding, from which an appeal has been taken, from one court to another, is wholly or partly affirmed, or is modified, upon the appeal, the appellate court may enforce its order, or may direct the proceedings to be remitted, for that purpose, to the court below, or to the judge who made the order appealed from.[241]

ART. V. APPEAL FROM APPELLATE TERM TO APPELLATE DIVISION.

§ 2843. Code provision.

Section 3194 of the Code provides for a remittitur where an appeal has been taken to the appellate division from the appellate term and requires judgment absolute in case of affirmance of an order granting a new trial, on a case or exceptions, and an assessment of damages in the city court, the same as on an appeal to the court of appeals.

[241] Code Civ. Proc. § 1320. The appellate division may grant relief which the county court has no power to grant. Ithaca Agricultural Works v. Eggleston, 21 State Rep. 566, 4 N. Y. Supp. 933.

CHAPTER XVIII.

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ART. I. GENERAL RULES.

§ 2844. Scope of chapter and Code provisions to be considered.

Costs on appeal to the court of appeals, the appellate division of the supreme court, and the appellate term, will be considered in this chapter, except the rules peculiarly applicable to costs on appeal from a surrogate's court and from city courts not of record.

Prior to the present Code, the right to costs depended on the Code rules applicable to costs in the trial court but now the right is definitely fixed by the Code, and the rule that costs in the lower court can only be obtained where provided for by statute applies to the costs on appeal.[1] Sections 3238 and 3239 of the Code fix the right to costs on appeal while subdivisions 4 and 5 of section 3251 fix the items of costs allowable. These Code provisions apply only to an action in the supreme court, the city court of the city of New York, or a county court,[2] and do not apply to an action commenced in some other court and transferred to one of the courts named.[3]

§ 2845. Power to grant or withhold.

The court to which the appeal is taken is the only court which can award the costs of the appeal, except that where a further appeal is taken to the court of appeals and the appellate division has not exercised its discretion, the costs of the first appeal may be awarded by the court of appeals. The court may, it seems, award costs even though it has no jurisdiction to hear the appeal.[4] If costs follow as a matter of course, the

[1] See People ex rel. N. Y. Soc. for Prevention of Cruelty to Children v. Gilmore, 88 N. Y. 626.

[2] Code Civ. Proc. § 3347, subd. 13.

[3] Levene v. Hahner, 62 App. Div. 195, 70 N. Y. Supp. 913.

[4] Where a party on notice of the hearing of an appeal, attends to oppose, the court has jurisdiction to award costs, though by reason of no

court has no power to withhold the costs, and the addition of the words "with costs" or "without costs" to its order does not effect the right of the successful party.[5]

—— **Stipulation as to costs.** The right to costs may be fixed by stipulation.[6]

§ 2846. Necessity of awarding costs.

The successful party is not entitled to costs, where they are discretionary, unless specially awarded.[7] In such a case, if the order is silent as to costs, none can be taxed in favor of either party. For instance, no costs should be taxed where a new trial is awarded by the appellate court, unless the order of the appellate court expressly provides therefor.[8] But where costs are a matter of course they may be taxed though not referred to in the order of the appellate court.[9]

§ 2847. What law governs.

The costs of an appeal are to be taxed according to the law at the time of the decision of the appellate court, or when the judgment of that court is made the judgment of the lower court.[10]

appeal in fact being entered, it has no general jurisdiction of the cause. Mechanics' Bank v. Snowden, 2 Paige, 299.

[5] Tompkins County Sup'rs v. Bristol, 58 How. Pr. 3; Ayers v. Western R. Corp., 49 N. Y. 660.

[6] Moses v. McDivitt, 2 Abb. N. C. 47. In this case, the event in which costs were to be allowed did not happen, and costs were not allowed to the prevailing party. Effect of stipulation to abide the event of another appeal, see post, § 2864.

[7, 8] Pennell v. Wilson, 2 Abb. Pr. (N. S.) 466, 28 Super. Ct. (5 Rob.) 674.

[9] Combs v. Combs, 25 Hun, 279; Clarke v. Meigs, 23 Super. Ct. (10 Bosw.) 337; Ayers v. Western R. Corp., 49 N. Y. 660. The words "with costs" in the memorandum do not affect the rights of the parties in their claim to costs on appeal since their rights are fixed and determined by the law itself. Tompkins County Sup'rs v. Bristol, 58 How. Pr. 3.

[10] Ackley v. Tarbox, 19 Abb. Pr. 119. Compare vol. 3, p. 2904.

§ 2848. Waiver of right to costs.

A party may waive the costs of appeal by perfecting a judgment upon the order of affirmance without inserting them.[11]

§ 2849. Actions against municipal corporations.

Costs of appeal may be awarded against a municipal corporation though the claim has not been duly presented before trial so as to authorize costs in the lower court.[12]

ART. II. DISCRETION OF COURT.

(A) WHEN COSTS ARE A MATTER OF RIGHT.

§ 2850. Code rule.

"Upon an appeal from the final judgment in an action, the recovery of costs is regulated as follows:

"1. In an action specified in section 3228 of this act, the respondent is entitled to costs upon the affirmance, and the appellant upon the reversal, of the judgment appealed from; except that, where a new trial is directed, costs may be awarded to either party, absolutely or to abide the event, in the discretion of the court.

"2. In every other action, and also where the final judgment appealed from is affirmed in part, and reversed in part, costs may be awarded in like manner, in the discretion of the court."[13]

In short, if the action is a common-law one, costs are a matter of course on (1) affirmance, or (2) reversal; unless (a) a new trial is directed, or (b) the affirmance or reversal is only

[11] Whitney v. Townsend, 67 N. Y. 40. See, also, vol. 3, p. 2905.

[12] Utica Water Works Co. v. City of Utica, 31 Hun, 426.

[13] Code Civ. Proc. § 3238. Actions specified in § 3228, see vol. 3, pp. 2906 et seq. Appeal from judgment in a common-law action, granted because of frivolousness of answer, is an appeal from a final judgment so that there is no discretion as to the costs of the appeal where there is an affirmance or reversal without granting a new trial. McMoran v. Lange, 25 App. Div. 11, 48 N. Y. Supp. 100.

partial, in which case costs are discretionary. In equity cases, costs on appeal are always discretionary the same as in the trial court.

A holding that this Code provision applies to actions commenced in a justice's court, appealed to the county court, and thence taken by appeal to the appellate division of the supreme court,[14] is overruled by a later decision which holds that it applies only to actions "begun" in the supreme court, a county court, or the city court of New York.[15]

(B) WHEN COSTS ARE DISCRETIONARY.

§ 2851. Appeal from final judgment.

Costs are discretionary, on appeal from a final judgment, (1) where a new trial is directed, (2) where the judgment is affirmed in part and reversed in part, and (3) where the judgment was rendered in an equitable action, i. e., an action not specified in section 3228 of the Code.[16] Where the award of costs of the trial of an action is discretionary in the lower court the same discretion is vested in the appellate court as to the costs of the appeal.[17]

The general rule, in equity cases, is that one who appeals and obtains a reversal or modification on an objection which was not urged in the lower court but which might have been, should nevertheless be charged with costs.[18] For instance, where the point upon which the appellate division reverses a judgment is one which might have been taken by demurrer, but was for the first time taken on appeal from judgment at special term, neither party should be allowed costs on the reversal.[19] So where an appeal has been taken after an offer to

[14] Combs v. Combs, 25 Hun, 278.

[15] Levene v. Hahner, 62 App. Div. 195, 70 N. Y. Supp. 913.

[16] Code Civ. Proc. § 3238.

[17] See vol. 3, pp. 2925 et seq., for actions in which costs are discretionary in the trial court and the rules observed in exercising such discretion.

[18] Stewart v. Green, 11 Paige, 535; Jones v. Phelps, 2 Barb. Ch. 440.

[19] Youngs v. Wilson, 24 Barb. 510. Query, would this rule apply

correct the error on which the appeal is based, costs will generally not be allowed.[20]

—— **Where new trial is awarded.** Where a new trial is directed, "costs may be awarded to either party, absolutely or to abide the event, in the discretion of the court."[21] Costs on appeal always being discretionary in equity cases, the only purpose of this rule is to extend the discretion to common-law actions where the appellate court awards a new trial. If a new trial is granted and the judgment makes no provision as to costs, no costs of the appeal can be taxed.[22] Generally the appellate court, on granting a new trial, reverses "with costs to appellant to abide the event" or "with costs to abide the event." The meaning of such terms will be considered in another section.[23] No costs will be awarded in directing a new trial where the reversal is based on an objection first urged on appeal.[24]

—— **Where judgment is modified.** The discretion to award costs of appeal, where the judgment is affirmed in part and reversed in part, is given only to the appellate court, which thus modifies the judgment, and only as to the costs in that court.[25] Costs are discretionary on a partial affirmance though the action is to enforce a legal liability.[26] If the judgment is ma-

where the ground of demurrer is one not waived because not urged in the lower court?

[20] Perrine v. Hotchkiss, 2 T. & C. 370.

[21] Code Civ. Proc. § 3238, subd. 1.

[22] See ante, § 2834.

[23] See post, §§ 2880, 2881.

[24] Howell v. Wright Dairy Co., 31 Misc. 755, 64 N. Y. Supp. 55; Janos v. Samstag, 31 Misc. 790, 65 N. Y. Supp. 223.

[25] Sturgis v. Spofford, 58 N. Y. 103. Costs of appeal will not be granted to plaintiff in an action against a constable where the remedy sought was somewhat severe, and the judgment in plaintiff's favor was modified. Rutzkowski v. George, 92 Hun, 412, 71 State Rep. 855, 36 N. Y. Supp. 762. The notice of appeal being too broad, the court in modifying the order appealed from refused costs. Matter of King, 130 N. Y. 602.

[26] Metropolitan El. R. Co. v. Duggin, 33 State Rep. 992, 11 N. Y. Supp. 819.

terially modified on appeal, no costs are usually awarded. But where the judgment is modified as to a matter which would have been corrected had appellant brought it to the attention of the trial court, respondent is entitled to costs of the appeal.[27] For instance, a mere error of calculation, to which the attention of the court below was not called, will not deprive the respondent of costs.[28] So a small error as to interest will not affect the question of costs.[29] If respondent substantially succeeds, though the judgment is modified, costs should be awarded to him.[30] Modifying a judgment by striking out the clause, making the dismissal of the complaint a dismissal "on the merits," does not affect the respondent's right to costs on the appeal.[31] Where a judgment can be modified only on appeal, it seems that the appellant should have costs of the appeal where it results in a modification of the judgment appealed from.[32]

In the absence of special circumstances, where a judgment is reversed as to one defendant and affirmed as to the other, where both appeal, costs should be awarded the successful appellant.[33]

§ 2852. Appeal from interlocutory judgment or order.

"Upon an appeal from an interlocutory judgment or an order, in an action, costs are in the discretion of the court, and may be awarded absolutely, or to abide the event, except as follows:

"1. Where the appeal is taken from an order, granting or refusing a new trial, and the decision upon the appeal refuses a

[27] Zimmerman v. Long Island R. Co., 14 App. Div. 562, 43 N. Y. Supp. 883.

[28] Clark v. Geery, 40 Super. Ct. (8 J. & S.) 227.

[29] Bank of Syracuse v. Wisconsin Marine & Fire Ins. Co. Bank, 36 State Rep. 584, 12 N. Y. Supp. 952.

[30] Harris v. Osnowitz, 35 App. Div. 594, 55 N. Y. Supp. 172; De Lancey v. Piepgras, 76 Hun, 70, 27 N. Y. Supp. 1110.

[31] Johnson v. Lord, 35 App. Div. 325, 328, 54 N. Y. Supp. 922.

[32] See Darde v. Conklin, 73 App. Div. 590, 77 N. Y. Supp. 39.

[33] Montgomery County Bank v. Albany City Bank, 7 N. Y. (3 Seld.) 459, 465.

new trial, the respondent is entitled, of course, to the costs of the appeal.

"2. Where an appeal is taken from an order, refusing a new trial, and an appeal is also taken from the judgment rendered upon the trial, neither party is entitled to the costs of the appeal from the order." [34]

Observe that this Code provision applies to an appeal from an order "in an action."

Subdivision two, supra, relates only to new trials on the minutes,[35] and does not apply to an appeal from an order denying a motion for a new trial because of the failure to file a decision within twenty days.[36]

Costs are usually imposed on affirming or reversing an order except where the question is new and the practice unsettled,[37] and except that where the objection on which the reversal is based was not raised in the lower court, the reversal should be without costs.[38] If the order is silent as to costs, none can be taxed,[39] except where the appeal is from an order granting or refusing a new trial and the appellate court refuses a new trial, in which case there is no discretion as to costs.

§ 2853. Appeal from order in a special proceeding.

Costs on an appeal in a special proceeding, taken to a court of record where the costs thereof are not specially regulated by the

[34] Code Civ. Proc. § 3239. That costs are discretionary, see Savage v. Darrow, 4 How. Pr. 74, subd. 1; McIntyre v. German Sav. Bank, 59 Hun, 536, 13 N. Y. Supp. 674. Subd. 2. Where the appellate division, upon affirming a judgment appealed from, also affirms an order denying a motion for a new trial, having awarded costs upon the appeal from the judgment, the court has no further power to award costs upon the appeal from the order. Syms v. City of New York, 105 N. Y. 153. Compare, as contra, Keeler v. Barrett's etc., Dyeing Establishment, 54 Super. Ct. (22 J. & S.) 550, 18 Abb. N. C. 459, 12 Civ. Proc. R. (Browne) 121.

[35] Streep v. McLoughlin, 36 Misc. 165, 72 N. Y. Supp. 1061, does not apply to costs on appeal from an order refusing a motion for a new trial made on the ground of newly-discovered evidence. Id.

[36] Garrett v. Wood, 61 App. Div. 293, 70 N. Y. Supp. 358.

[37] See Hesse v. Briggs, 45 Super. Ct. (13 J. & S.) 417.

[38] Dohn v. Buffalo Amusement Co., 66 App. Div. 446, 73 N. Y. Supp. 95.

[39] Savage v. Darrow, 4 How. Pr. 74, 2 Code. R. 57.

Code,[40] may be awarded to any party, in the discretion of the court.[41] On reversing an order adjudging a person guilty of a "criminal" contempt, costs cannot be imposed on the relator, since the proceeding is not a special proceeding and no provision is made in the statutes as to costs in such cases.[42]

——**In condemnation proceedings.** If a trial has been had and judgment entered in favor of the defendant, and plaintiff appeals, if the judgment is affirmed costs shall be allowed to the respondent, but if reversed or modified no costs of the appeal shall be allowed to either party.[43] In other words, where the company instituting condemnation proceedings appeals from an award, no costs should be awarded against the landowners in any event.[44]

§ 2854. On dismissal of appeal.

Usually costs are imposed on the appellant where the appeal is dismissed on motion, and a dismissal "with costs" is provided for by the rules of court where the dismissal is because of appellant's failure to print and serve the appeal papers. But where all the parties were ignorant, at the time of the rendition of the judgment, of the actual disqualification of the judge because of his distant relationship to one of the parties, a dismissal of an appeal from the judgment will be without costs.[45] So where parties succeed in an application to dismiss

[40] On a writ of certiorari to review the determination of an inferior tribunal, costs, not exceeding fifty dollars and disbursements, may be awarded by the final order, in favor of or against either party, in the discretion of the court. Code Civ. Proc. § 2143. Costs are "specially regulated" in supplementary proceedings. Jones v. Sherman, 11 Civ. Proc. R. (Browne) 416. So costs on an appeal from a summary proceeding instituted before a justice of the peace are specially regulated by sections 2260 and 3066 of the Code and hence are not discretionary. Harrison v. Swart, 34 Hun, 259.

[41] Code Civ. Proc. § 3240; Matter of Babcock's Estate, 86 App. Div. 563, 83 N. Y. Supp. 1020. What are special proceedings, see vol. 1.

[42] People ex rel. N. Y. Soc. for Prevention of Cruelty to Children v. Gilmore, 88 N. Y. 626.

[43] Code Civ. Proc. § 3376.

[44] Matter of New York, W. S. & B. R. Co., 94 N. Y. 287, 294.

[45] Elmira Realty Co. v. Gibson, 103 App. Div. 140, 92 N. Y. Supp. 913.

one appeal, but fail as to the other, neither party will be given costs upon the motion to dismiss;[46] but costs will be allowed against appellant on the dismissal of one of two appeals from the same judgment on two separate records which present the same question, though it was taken from an abundance of caution to make certain of the hearing of the question on one record or the other and to settle a doubtful point of practice and the appellant is successful on the other appeal.[47]

§ 2855. On cross-appeals.

Where, on cross-appeals, both parties succeed in part, no costs of the appeal should be allowed to either.[48]

ART. III. SEPARATE BILLS OF COSTS.

§ 2856. Several appellants.

Where several co-parties appeal, but there is only one set of papers, one argument, and one judgment, there is but one appeal, and the successful party is entitled to but one bill of costs, notwithstanding the several appellants appeared by different attorneys.[49]

§ 2857. Several respondents.

In an action against two or more defendants who appear separately by different attorneys but set up substantially the same defense, where the complaint is dismissed and separate bills of costs taxed, and on appeal the judgment is affirmed on one argument, only one bill of costs of the appeal should be taxed, since it is not necessary for all the defendants to print points or prepare for argument.[50]

[46] Hunt v. Wallis, 6 Paige, 371.

[47] Abbey v. Wheeler, 170 N. Y. 122.

[48] Sherman v. Matthieu, 106 App. Div. 368, 94 N. Y. Supp. 565.

[49] Everson v. Gehrman, 2 Abb. Pr. 413. See, also, Wilbur v. Wiltsey, 13 How. Pr. 506.

[50] De Lamater v. Carman, 2 Daly, 182. So parties who jointly demur or answer, and jointly succeed, cannot be entitled to several bills of cost on appeal, though they employ different attorneys on the appeal.

§ 2858. Appeal by both parties.

Where both parties appeal in a common-law action, where the right to costs is absolute if the judgment is affirmed, costs on affirmance should be awarded in favor of the respondent on each appeal with a provision for an offset;[51] but where the costs are discretionary, the affirmance should be without costs to either party.[52] Where both parties appeal and one abandons his appeal and the other fails in his appeal, neither should have costs as against the other.[53] Where the plaintiff fails utterly in his appeal, and one defendant succeeds on his appeal as against co-defendants, instead of ordering plaintiff to pay costs to defendants appealed against and they to their co-defendant, the court of appeals will direct costs against plaintiff directly in favor of the latter.[54] One who takes a cross-appeal is not exonerated from paying costs on affirmance by the fact that he sought and argued for affirmance, and only appealed to secure an expression of opinion from the appellate court in case of reversal.[55]

§ 2859. Separate appeals by co-parties.

Upon separate appeals by different defendants, in a suit to settle the right to a fund in court, costs cannot be awarded between the appellants, unless they have made each other parties to their respective appeals.[56]

§ 2860. Appeal from two or more orders.

While separate bills of costs are proper where separate ap-

The manner in which they answer or demur, determines the question as to their right to recover separate bills, so long as they all succeed in the action. Wilbur v. Wiltsey, 13 How. Pr. 506.

[51] Tompkins County Sup'rs v. Bristol, 58 How. Pr. 3, followed in Martin v. Tarbox, 23 Misc. 761, 51 N. Y. Supp. 319.

[52] Kiah v. Grenier, 1 T. & C. 388, 393; Delafield v. Village of Westfield, 41 App. Div. 24, 29, 58 N. Y. Supp. 277.

[53] Leftwich v. Clinton, 4 Lans. 176.

[54] Merchants' & Traders' Nat. Bank v. City of New York, 97 N. Y. 355.

[55] Tompkins County Sup'rs v. Bristol, 58 How. Pr. 3.

[56] Potter v. Chapin, 6 Paige, 639.

peals are taken from different orders,[57] yet it would seem that where one appeal is taken from two or more orders and there is but one set of papers and one argument, only one bill of costs should be allowed.[58] It is held, however, that the respondent is entitled to costs on each of several appeals from independent orders taken on a single notice of appeal, specifying them all.[59] Where there are two orders of the same date, and it is uncertain which the notice of appeal meant to point out, but it is plain that the appeal is only taken from one, costs of only one appeal can be allowed.[60]

§ 2861. Appeal from judgment and from order denying a new trial.

Where a judgment and an order denying a new trial are appealed from and heard together on the same set of papers, costs of but one appeal will be allowed.[61] It follows that if the motion for a new trial is not based on the judge's minutes, two bills of costs are to be taxed, since in such a case the appeal from the judgment and the order cannot be heard on the same set of papers.[62] This is the proper construction to be put on the Code provision that "where an appeal is taken from an order refusing a new trial, and an appeal is also taken from the judgment rendered on the trial, neither party is entitled to the costs of the appeal from the order."[63]

§ 2862. Where two or more actions tried as one.

Where two cases were practically consolidated, the referee

[57] See Fulton Bank v. Beach, 2 Paige, 185.

[58] See Matter of Prospect Park & C. I. R. Co., 67 N. Y. 371, 378.

[59] Brassington v. Rohrs, 3 Misc. 262, 22 N. Y. Supp. 1053.

[60] Stanton v. King, 76 N. Y. 585.

[61] Van Alen v. American Nat. Bank, 10 Abb. Pr. (N. S.) 331; Bullard v. Pearsall, 46 How. Pr. 383; West v. Lynch, 1 City Ct. R. 174. And when such a motion is denied and the moving party appeals from the order denying it as well as from the judgment, and the order is reversed with costs, or with costs to abide event, the costs are at that rate, notwithstanding he may be entitled to the like sum on his appeal from the judgment. Pilgrim v. Donnelly, 15 Abb. N. C. 240.

[62] See ante, § 2725.

[63] Code Civ. Proc. § 3239, subd. 2.

making but a single report in both, and judgment was entered with but a single bill of costs, and the judgment affirmed by the appellate division, and but one appeal and one transcript taken from the court below, upon affirmance in the court of appeals, there can be but one bill of costs.[64]

§ 2863. Where action is severed.

Full costs upon both appeals may be recovered where the action has been severed, two judgments entered, and two appeals taken.[65] Section 3231 of the Code precluding costs in more than one action, in certain instances where two or more actions are brought for the same cause of action, does not apply to the costs on appeal.[66]

§ 2864. Where decision is to abide the event of another appeal.

Where it is stipulated that the decision on an appeal from an order in an action stand as the decision on the appeals from a like order in several other actions, and there is a reversal with costs, costs for argument in each case may be taxed though there was but one argument.[67]

§ 2865. Where motion and appeal heard at same time.

It seems that the successful party is entitled to the costs of the appellate division on exceptions heard there in the first instance and to separate costs on appeal from an order denying a motion for a new trial in a common-law action, although both were heard at the same time.[68]

[64] King v. Brush, 5 Alb. Law J. 137.

[65] Pratt v. Allen, 19 How. Pr. 450.

[66] Volume 3, p. 2921. If one defendant demurs and one answers, and the plaintiff is successful in both cases, he is entitled to two bills of costs in the appellate court, though only to one in the lower court. Pratt v. Allen, 19 How. Pr. 450, 456.

[67] Hauselt v. Godfrey, 3 Civ. Proc. R. (Browne) 116.

[68] Reichel v. New York Cent. & H. R. R. Co., 18 Civ. Proc. R. (Browne) 248, 29 State Rep. 843, 9 N. Y. Supp. 414.

§ 2866. Where there are several judgments of affirmance by an intermediate court.

Where there was but one action and one record, only one bill of costs was allowed by the court of appeals though the record contained several judgments of affirmance by the appellate division.[69]

ART. IV. PERSONS ENTITLED AND LIABLE, AND PAYMENT FROM FUND.

§ 2867. Persons liable.

In the trial court, persons other than parties to the action may be made liable for costs,[70] and it would seem that this rule applies to some extent to the costs of an appeal.[71] It has been held that where the costs of the appeal are in the discretion of the court, they may be imposed upon any party to the application, reviewed by the appeal, although such party be not a party to the action.[72] A co-party who does not appeal cannot be charged with costs of the appeal.[73]

The provision of Code Civ. Proc., § 3247, giving costs against one "beneficially interested," though not a party of record, applies only to the interest of or transfer to one prosecuting an appeal and not to one responding to an appeal.[74]

[69] Veeder v. Mudgett, 95 N. Y. 295, 315.

[70] Volume 3, pp. 2943 et seq.

[71] On appeal from an order vacating an attachment, it is within the discretion of the court to direct the costs of appeal to be paid by the petitioner, though he did not have any personal interest in the prosecution of the writ, where its inception was due to him and he was in close privity therewith. Matter of Bradner, 87 N. Y. 171. The rule that it is not usual to allow costs against the wife in an action for divorce, applied, refusing costs of a successful appeal from an order adjudging the husband in contempt for nonpayment of alimony. Mendel v. Mendel, 4 State Rep. 556, 25 Wkly. Dig. 314.

[72] Higgins v. Callahan, 2 Civ. Proc. R. (Browne) 302, 10 Daly, 420.

[73] Tompkins County Sup'rs v. Bristol, 58 How. Pr. 3.

[74] Peetsch v. Quinn, 12 Misc. 61, 66 State Rep. 689, 24 Civ. Proc. R. (Scott) 394, 1 Am. Cas. 282, 33 N. Y. Supp. 87. See, also, Beck v. Kerr, 87 App. Div. 1, 83 N. Y. Supp. 1057.

There is some question whether the Code provision authorizing the imposition of costs against a representative such as an executor, administrator, or trustee, to be paid personally and not as the representative of an estate, applies to the costs of an appeal.[75]

§ 2868. Persons entitled.

Where a person is permitted to come in as a party, pending the appeal, and he successfully moves to have the case stricken from the calendar and for a judgment of affirmance because of the failure of appellant to print and serve his papers, the moving party himself is entitled to the costs.[76] If one bill of costs is awarded to two successful defendants, and the judgment is affirmed as to one without costs and reversed as to the other with costs to abide the event, the successful defendant may collect the costs awarded to both defendants in an action on the undertaking given on appeal.[77]

§ 2869. Ordering costs to be paid from fund.

The costs of the appeal, as well as the costs of the lower court,[78] are sometimes ordered to be paid from the fund in controversy in equity cases,[79] especially on appeals from a decree of a surrogate.[80]

[75] Volume 3, p. 2952.

[76] Sprague v. Richards, 30 Hun, 246.

[77] Fritchie v. Holden, 32 State Rep. 276, 19 Civ. Proc. R. (Browne) 84, 11 N. Y. Supp. 171.

[78] Volume 3, p. 2931.

[79] In an action to construe a will, brought by the executor, the costs may be ordered paid out of the estate, but the appellants may be charged with costs if several appeals are taken. McLean v. Freeman, 70 N. Y. 81, 89. See People v. American Loan & Trust Co., 177 N. Y. 467, 472. After questions arising upon the construction of a will have been fairly decided against complainant by a competent tribunal, and he appeals, he ought not, except under very special circumstances, to be excused from payment of costs upon his failure in the appellate court, and to be allowed to throw the costs of the adverse parties upon a fund belonging exclusively to themselves. Mowatt v. Carrow, 7 Paige, 328.

[80] Code Civ. Proc. § 2589. Whether costs should be imposed on trustee or fund, see Matter of McCarter, 94 N. Y. 558.

ART. V. AMOUNT AND ITEMS.

§ 2870. Appeal to the court of appeals.

On an appeal to the court of appeals, thirty dollars are allowed as costs before argument and sixty dollars for argument, in addition to term costs and any sum awarded as damages for delay.[81] Nothing can be taxed as costs of the appeal except the costs before argument, costs of argument, term costs, any damages allowed for delay, and disbursements, and hence nothing can be taxed for making and serving a case.[82] The same amount of costs are allowed on an appeal from an order as on an appeal from a judgment.[83] Full costs are allowed though the appeal is heard as a motion.[84]

Where an appeal, whether from an order or a judgment, is dismissed in the court of appeals, with costs, after a submission for decision on the merits, general costs of an appeal follow, and not the mere costs of a motion;[85] but a dismissal which is the result of a preliminary motion, and not of a hearing or a motion embodied in the hearing, does not carry an argument fee.[86]

—— **Term fees.** Ten dollars is allowed for each term, not exceeding ten, at which the cause is on the calendar, excluding the term at which it is argued or otherwise finally disposed of.[87] But one term fee can be charged for each calendar year, and where the case is disposed of during the same year in which it first appears on the calendar the party is not entitled to tax a term fee.[88] Term fees cannot be allowed for any term

[81] Code Civ. Proc. § 3251, subd. 5.

[82] Shaver v. Eldred, 86 Hun, 51, 33 N. Y. Supp. 158.

[83] Brown v. Leigh, 52 N. Y. 78; Tauton v. Groh, 9 Abb. Pr. (N. C.) 453.

[84] Hall v. Emmons, 40 How. Pr. 137.

[85] White v. Anthony, 23 N. Y. 164.

[86] Matter of Wray Drug Co., 93 App. Div. 456, 87 N. Y. Supp. 676, which reviews the earlier cases.

[87] Code Civ. Proc. § 3251, subd. 5.

[88] Becker v. Metropolitan El. R. Co., 30 N. Y. Supp. 400; Degener v.

at which the cause was noticed prior to the filing of the return.[89]

—— **Damages for delay.** Where a judgment is affirmed by the court of appeals, the court may, in its discretion, also award damages, by way of costs, for the delay, not exceeding ten per cent on the amount of the judgment; or where it was rendered on an appeal, on the amount of the original judgment.[90] Damages for delay are rarely awarded, and should not be where the question involved is not free from difficulty,[91] i. e., the appeal presents debatable questions,[92] or where the appellant has some right and has not actually caused a delay.[93]

§ 2871. Appeal to the supreme court or appellate division.

"Costs are allowed to either party upon an appeal to the supreme court, from an inferior court, excepting upon an appeal to the supreme court from the city court of the city of New York; or upon an appeal to the appellate division of the supreme court or to the supreme court from the city court of the city of New York, taken from an interlocutory or final judgment, or from an order granting or refusing a new trial,

Underwood, 62 State Rep. 121, 31 Abb. N. C. 479, 30 N. Y. Supp. 399; Palmer v. De Witt, 42 How. Pr. 466; Whiteman v. Leslie, 1 Month. Law Bul. 50; Powell v. New York Cent. & H. R. R. Co., 14 Civ. Proc. R. (Browne) 125, 3 N. Y. Supp. 763.

[89] Reformed Protestant Dutch Church v. Brown, 24 How. Pr. 89.

[90] Code Civ. Proc. § 3251, subd. 5; Cohen v. City of New York, 128 N. Y. 594; Warner v. Lessler, 33 N. Y. 296. Extra costs in court of appeals for delay awarded where the appellant persisted in prosecuting an appeal, although the questions involved had been previously determined adversely to his contention in an appeal in another action against the same appellant. Jackson v. City of Rochester, 124 N. Y. 624. Mode of computation. Adams v. Perkins, 25 How. Pr. 368. Where the court of appeals, on affirming a judgment, awards a percentage of damages to the respondent, it should be computed upon the amounts of both judgments below, but not upon the accrued interest upon the judgments. Becker v. Metropolitan El. R. Co., 30 N. Y. Supp 400; Degener v. Underwood, 62 State Rep. 121, 31 Abb. N. C. 479, 30 N. Y Supp 399.

[91] Cuyler v. Stevens, 5 Wend. 93.

[92] Tisdale v. Delaware & H. Canal Co., 116 N. Y. 416.

[93] Blazy v. McLean, 146 N. Y. 390.

rendered or made at a trial term of the supreme court or of the city court of the city of New York: * * * Before argument, twenty dollars. For argument, forty dollars. * * * In all appeals taken under section 3189 costs awarded to the successful party shall not exceed ten dollars in addition to the taxable disbursements." [94]

For ambiguity, this Code provision is worthy of study. As construed by the cases, however, there is little difficulty in its application. First, it is held that full costs are to be taxed on an appeal from the county court though the appeal is from an order,[95] and while such a holding seems to be a proper construction of the provision yet the purpose of the legislature in allowing full costs in such a case when only motion costs are allowed on an appeal to the appellate division from an order made at the trial or special term, except on appeal from an order granting or refusing a new trial, is not clear.[96] Second, it was formerly held that on an appeal from an order of the city court of New York, the prevailing party was entitled to the same costs as on an appeal from a judgment,[97] but the last sentence of the above Code provision, which was added by amendment in 1902, limits the amount of costs on appeal from orders of the city court of New York, though it has recently been held that it does not limit the amount of costs on an appeal from an interlocutory judgment.[98]

The words "trial term," as used in the Code provision, are

[94] Code Civ. Proc. § 3251, subd. 4. The omitted portions of the Code provision relate to term fees and to costs on original motions in the appellate division not connected with an appeal Applies to interlocutory judgment entered on overruling or sustaining a demurrer. Van Gelder v. Van Gelder, 13 Hun, 118. The court has no discretion to change the amount. Roberson v. Rochester Folding Box Co., 68 App. Div. 528, 73 N. Y. Supp. 898.

[95] Order granting trial on the judge's minutes. Cusick v. Adams, 47 Hun, 455.

[96] Motion costs only on appeal from order made at trial or special term. Phipps v. Carman, 26 Hun, 518.

[97] Burnell v. Coles, 26 Misc. 378, 56 N. Y. Supp. 208.

[98, 99] Campbell v. Hallihan, 46 Misc. 409, 92 N. Y. Supp. 413.

used in their broad sense and do not exclude from its application judgments rendered at special term.[99]

—— **Costs for argument.** Consent to a withdrawal of the appeal, after argument, waives the right to costs for argument.[100] The submission of an appeal by consent, without oral argument, is an "argument" within this section, so that the fee for argument can be taxed as if there actually had been an oral argument.[101] Two argument fees may be allowed when a reargument was caused by no act or omission of the party taxing them.[102] Where a reargument de novo is ordered to enlighten a justice of the appellate division assigned thereto after the first argument and the allowance of a reargument, the successful party is entitled to tax a fee for the reargument as well as for the original argument.[103] Where judgment for plaintiff is affirmed and then, on reargument, reversed with costs to abide the event, and he succeeds on a new trial, the costs on both arguments on appeal are taxable against defendant, but only one item of costs before notice of argument.[104]

—— **Term fees.** The party entitled to costs may tax ten dollars for each term, not exceeding five, of the appellate division, at which the cause is necessarily on the calendar, excluding the term at which it is argued or otherwise finally disposed of.[105] A term fee is not allowable on an appeal from an order.[106] Term fees are not allowable for terms when the case was improperly on the calendar and not in a condition to be argued,[107] as where the case has not been printed nor the appeal made ready for argument.[108]

[100] Losee v. Bullard, 54 How. Pr. 319, 322.

[101] Malcolm v. Hamill, 65 How. Pr. 319, 322.

[102] Guckenheimer v. Angevine, 16 Hun, 453.

[103] Roberson v. Rochester Folding Box Co., 68 App. Div. 528, 73 N. Y. Supp. 898.

[104] Miller v. King, 32 App. Div. 349, 52 N. Y. Supp. 1041.

[105] Code Civ. Proc. § 3251, subd. 4. By the 1902 amendment of this subdivision this clause does not apply to appeals to the supreme court from an order (or interlocutory judgment) of the city court of New York.

[106] Ennis v. Wilder, 14 Wkly. Dig. 211.

—— **Appeal from order in special proceedings.** It is not entirely clear as to what costs are allowable on an appeal from an order in a special proceeding. The Code provides that the costs on an appeal from an order in a special proceeding are to be awarded at the rates allowed on an appeal from a judgment, except where the costs are specially regulated by the Code.[109] There are cases holding that full costs may be taxed and not merely motion costs,[110] though there is authority to the contrary.[111]

—— **Appeal transferred from county court.** The fact that an appeal to the county court from a justice's court is transferred to the supreme court by reason of the disqualification of the county judge does not make it an appeal to the supreme court, and the prevailing party is not entitled to costs as of such an appeal, but only of an appeal to the county court.[112]

—— **Dismissal of appeal.** On dismissal with costs after an argument on the merits, respondent is entitled to general costs and not merely the costs of a motion to dismiss,[113] but on dis-

[107] Nobis v. Pollock, 18 Civ. Proc. R. (Browne) 1, 13 N. Y. Supp. 837.

[108] Van Gelder v. Hallenbeck, 14 Civ. Proc. R. (Browne) 333, 18 State Rep. 19, 2 N. Y. Supp. 252.

[109] The amount of costs is specially regulated by the Code in supplementary proceedings. Jones v. Sherman, 11 Civ. Proc. R. (Browne) 416. It is held, however, that in a proceeding by certiorari to review an assessment where an appeal by the relator is sustained, the provisions of L. 1880, c. 269, govern the award of costs and the costs of appeal allowed him are to be taxed as on appeal from orders under Code Civ. Proc. § 3239, and not as in actions under section 3240. People ex rel. Oak Hill Cemetery Ass'n v. Pratt, 67 Hun, 578, 50 State Rep. 355, 21 N. Y. Supp. 853; jt. aff. 138 N. Y. 655. Prior to the amendment of section 1340 of the Code, in 1881, it was held that only motion costs were recoverable. Matter of New York P. E. Public School, 24 Hun, 367. Code Civ. Proc. § 1240; Everall v. Lassen, 13 Daly, 10. This applies to costs in mandamus proceedings. People ex rel. Bray v. County Sup'rs, 65 How. Pr. 327.

[110] People ex rel. Bray v. Ulster County Sup'rs, 65 How Pr. 327; Cole v. Terpenning, 27 Hun, 111.

[111] Walsh v. Van Allen, 36 Hun, 629.

[112] O'Callaghan v. Carroll, 16 How. Pr. 327; McLaughlin v. Smith, 3 Hun, 250.

[113] Webb v. Norton, 10 How. Pr. 117.

missing an appeal on motion, the appellate division[114] cannot allow an argument fee, but only motion costs. Where an appeal is dismissed unless the case is served and the cause put on the calendar of a certain term, and the appellant fails so to do, the respondent cannot thereafter put the case on the calendar and have a judgment of affirmance by default entered so as to be able to tax a full bill of costs, but is entitled only to motion costs, i. e., ten dollars.[115]

§ 2872. Charge for making case.

The charge of twenty dollars for making a case is not allowable where no case is made, though the evidence taken before a referee is printed,[116] nor where the appeal is from an order in a special proceeding which is not heard on a case.[117] No charge for making a case is allowable on an appeal to the court of appeals.

§ 2873. Disbursements.

The general rules laid down in a preceding volume as to disbursements[118] apply to disbursements on appeal.[119] If an "order" is affirmed or reversed "with costs," only ten dollars costs can be taxed, since disbursements cannot be taxed on ap-

[114] Dunseith v. Stark, 3 Month. Law Bul. 42; Matter of George B. Wray Drug Co., 93 App. Div. 456, 87 N. Y. Supp. 676. A respondent who might have had the appeal dismissed on motion will not be allowed costs on its dismissal at the hearing. Williams v. Fitch, 15 Barb. 654. On dismissing an appeal for want of jurisdiction, the general costs cannot be awarded. People ex rel. Mallard v. Judges of Madison County, 7 Cow. 423.

[115] Mahon v. Mahon, 64 App. Div. 262, 72 N. Y. Supp. 102. Compare, as contra, Sprague v. Richards, 30 Hun, 246.

[116] Lazarus v. Danziger, 27 Abb. N. C. 147, 16 N. Y. Supp. 200.

[117] Matter of Board of Street Opening & Improvement, 34 App. Div. 500, 54 N. Y. Supp. 911.

[118] Volume 3, pp. 2977, 2978.

[119] Interest on judgment may be taxed as costs. Buck v. City of Lockport, 43 How. Pr. 283.

peal from an order unless the order of affirmance or reversal specifically includes them.[120]

—— **Printing expenses.** The "reasonable expense of printing the papers for a hearing, when required by a rule of court," is chargeable as a disbursement,[121] and this includes the cost of printing papers and points on appeal.[122] The amount paid is the sum to be taxed, in the absence of any showing that the sum charged was fraudulently or collusively exaggerated, or more than the usual charge at the place of the plaintiff's residence, for such services.[123] Where the printed copies of case used on appeal to the appellate division, are used, on a further appeal to the court of appeals, the appellants will only be allowed to charge for necessary additional papers and for the expense of printing the necessary additional copies.[124] If respondent is allowed by order to print additional papers, he cannot tax the costs of printing papers not referred to in that order.[125] An order reducing the amount allowed by the clerk is discretionary.[126] Where several parties unite in an

[120] Cassidy v. McFarland, 139 N. Y. 201, 209, followed in Bolte v. Dieckman, 58 App. Div. 85, 68 N. Y. Supp. 444. On the granting of an order dismissing an appeal for failure to serve printed appeal papers, with $10 costs of motion, and affirming the order appealed from "with costs of this appeal to be taxed by the clerk of this court," the clerk had no authority to tax in addition to the $10 motion costs, and $10 costs of the appeal, an amount for disbursements. Zinsser v. Herrman, 24 Misc. 689, 53 N. Y. Supp. 778; Burnell v. Coles, 26 Misc. 378, 56 N. Y. Supp. 208.

[121] Code Civ. Proc. § 3256.

[122] Erie R. Co. v. Ramsey, 10 Abb. Pr. (N. S.) 109. Only the requisite number of copies can be charged for. Byrnes v. Labagh, 12 Civ. Proc. R. (Browne) 417. Agreement with printer contingent on appellant's success on the appeal does not preclude taxing the cost of printing. Van Gelder v. Hallenbeck, 15 Civ. Proc. R. (Browne) 333, 2 N. Y. Supp. 252.

[123] Salter v. Utica & B. R. R. Co., 86 N. Y. 401. Price paid is the sum to be taxed. Potter v. Carpenter, 56 How. Pr. 89. Contra, Consalus v. Brotherson, 54 How. Pr. 62, which holds that the usual expense, though more than the sum paid, is the sum to be taxed.

[124] Potter v. Carpenter, 56 How. Pr. 89.

[125] Stubbs v. Ripley, 7 State Rep. 478.

[126] Corbett v. De Comeau, 45 Super. Ct. (13 J. & S.) 587.

appeal, and only a part are successful, the successful appellants, who have been allowed costs, cannot tax the charge for printing, where there was but one appeal book and one set of papers, without proof that they themselves, and not the unsuccessful appellants, incurred the expense.[127]

No charge for printing the case and points and other papers furnished in the court of appeals shall be charged as a disbursement unless it is shown by affidavit that the papers are properly folioed and printed in solid small pica, as required by rule five of the court of appeals.[128]

§ 2874. Increased costs.

The Code provision relating to increased costs—often referred to as double costs—has been set forth in a preceding volume,[129] and considered in connection with the decisions as to defendant's right to costs and one-half in certain actions. This provision, it is held, extends to costs of an appeal to the court of appeals, the appellate division or the supreme court,[130] but not to an appeal to the county court.[131] The right to increased costs is limited to where the officer succeeds as a respondent and does not apply to a case where he succeeds as an appellant.[132] In such actions where the statute provides for such costs, it is unnecessary that they should be mentioned by the appellate court in their decision. The statute leaves no discretionary power, but provides absolutely for the amount

[127] Kane v. Metropolitan El. R. Co., 15 Daly, 366, 7 N. Y. Supp. 653.

[128] Rule 5 of the court of appeals.

[129] Volume 3, pp. 2990 et seq.

[130] Wood v. Com'rs of Excise, 9 Misc. 507, 30 N. Y. Supp. 344.

[131] Shaver v. Eldred, 86 Hun, 51, 33 N. Y. Supp. 158.

[132] Scott v. Farley, 3 Month. Law Bul. 29; Foster v. Cleveland, 6 How. Pr. 253; Heimers v. Davidson, 2 City Ct. R. 308. After recovery in a justice's court against defendant, a public officer, who defended his acts as such, appealed to the county court, and the judgment being reversed, plaintiff appealed to the supreme court, where the latter decision was affirmed. Held, that defendant was not entitled to double costs on the first appeal, but was on the second. Wheelock v. Hotchkiss, 18 How. Pr. 468.

of costs to be taxed, and it remains only for the clerk to adjust the same, and include them in the judgment.[133]

§ 2875. Additional allowances.

The appellate court itself cannot grant an additional allowance as costs, except on appeals from a surrogate's court to the appellate division.[134] But where the appellate court awards to a party costs in the trial court, the award carries with it not only the taxable costs and disbursements, but such further sum, if any, by way of an extra allowance, as the trial court, in the exercise of a sound discretion, may award.[135]

ART. VI. PROCEDURE IN LOWER COURT.

(A) CONSTRUCTION OF ORDER OF APPELLATE COURT.

§ 2876. General considerations.

There is considerable diversity of opinion, as to the construction to be given to an order allowing or withholding costs or awarding them to abide the event, where the award of costs is discretionary. It has been said that each court will construe its own order in accordance with what was intended in the particular case before it, rather than in pursuance of any settled rule of construction, and with that construction a higher court will not interfere.[136]

Except in the following section, all the cases considered in this article are where the costs are discretionary, and not a matter of right, in the trial court.

§ 2877. Where costs are a matter of right in the trial court.

There is little difficulty in determining the right to costs after an appeal from a judgment in a common-law action in

[133] Carpentier v. Willett, 26 Super. Ct. (3 Rob.) 700, 28 How. Pr. 376.

[134] On appeal from surrogate's court, see Dupuy v. Wurtz, 3 T. & C. 113; Seguine v. Seguine, 3 Abb. Pr. (N. S.) 442.

[135] Hascall v. King, 165 N. Y. 288; Barnard v. Hall, 143 N. Y. 339.

[136] Durant v. Obendroth, 48 Hun, 16, 1 N. Y. Supp. 538; Union Trust Co. v. Whiton, 78 N. Y. 491, affirming 17 Hun, 593.

which the prevailing party is entitled to costs in the trial court as a matter of right. Where costs follow as a matter of course, on appeals from final judgments in common-law actions, where a new trial is not granted nor the judgment reversed in part and affirmed in part, the addition to a judgment of the appellate court of the words "with costs" or "without costs" is surplusage and cannot affect the right of the prevailing party to costs of the trial court and of all the appellate courts.[137] If the judgment is wholly reversed or affirmed by the court of appeals, the costs not only of the trial court but also of the appellate division follow as a matter of course notwithstanding the disposition of costs in the appellate division. For instance, if the action is one in which costs are a matter of right, a plaintiff is entitled to tax the costs in the appellate division though they were awarded to the defendant to abide the event, when the court of appeals orders judgment for the plaintiff with costs.[138] Where a judgment for defendant in a common-law action is affirmed by the appellate division but reversed by the court of appeals with costs to abide the event, and plaintiff finally recovers, he is entitled to costs of the appellate division as well as the trial costs and the costs of the court of appeals.[139] So where plaintiff obtains a verdict exceeding the sum of fifty dollars in an action for the recovery of money only, and the judgment upon it is reversed and a new trial ordered, with costs to the defendant to abide the event, and this order is reversed by the court of appeals and the judgment affirmed, the plaintiff is entitled to the costs of the appeal to the appellate division as well as the other costs.[140] Where, on the first trial in ejectment, a judgment for plaintiffs was reversed "with costs to the appellants to abide the event," and a second judgment for plaintiffs

[137] See ante, § 2845.

[138] Murtha v. Curley, 92 N. Y. 359.

[139] Donovan v. Vandemark, 22 Hun, 307. But see Bigler v. Pinkney, 24 Hun, 224, where the contrary was held where the court of appeals granted a new trial with costs "of the appeal to this court" to abide the event.

[140] Revere Copper Co. v. Dimmock, 29 Hun, 299.

was affirmed, and thereafter defendants moved for, and obtained, a statutory new trial on payment of all costs, and the new trial resulted in favor of defendants, the costs of the first appeal should be taxed in favor of defendants.[141]

Where costs are a matter of right because the judgment finally recovered was less favorable than that offered by the defendant, but costs in the court of appeals are discretionary because the judgment is reversed in part and affirmed in part, and the court of appeals exercises such discretion by ordering that neither party recover costs against the other in that court, the defendant is entitled to the costs of the trial and of the appellate division.[142] If the judgment entered on the judgment of the court of appeals is for less than the offer made by defendant though the original judgment was for more than the offer, costs after the offer cannot be awarded to plaintiff.[143]

Where a recovery by plaintiff for less than fifty dollars so that defendant was entitled to costs is reversed on appeal with costs to abide the event, and plaintiff recovers more than fifty dollars on the second trial, he is entitled to tax the costs and disbursements of the first trial as well as of the appeal and the second trial.[144] The fact that interest must be added to make the judgment on the second trial more than fifty dollars does not preclude the taxing of costs in favor of plaintiff where costs are ordered to abide the event.[145] So where an affirmance, with costs, of a judgment for defendant is reversed by the court of appeals with "costs to abide the event" and plaintiff recovers on the second trial a sum less than fifty dollars so that defendant is entitled to costs, defendant may tax the costs of both trials and both appeals, and is not limited to costs of the court of appeals and of the second trial.[146]

141 Barson v. Mulligan, 44 Misc. 26, 89 N. Y. Supp. 704.
142 Sturgis v. Spofford, 58 N. Y. 103.
143 Bathgate v. Haskin, 63 N. Y. 261.
144 Carpenter v. Manhattan Life Assur. Co., 25 Hun, 194.
145 Loring v. Morrison, 25 App. Div. 139, 48 N. Y. Supp. 975.
146 Isaacs v. New York Plaster Works, 43 Super. Ct. (11 J. & S.) 397, 4 Abb. N. C. 4.

§ 2878. Reversal or affirmance "with costs."

The appellate court, when it reverses or affirms "with costs" and is silent as to what costs are meant, usually intends merely the costs of the appellate court, where the action is one in which costs are discretionary. Of course, if the action is one in which the costs are a matter of course, the order has no effect either as to the costs of the trial court or of the appellate court. A reversal, "with costs," by the supreme court of the United States, has been held, in a particular case, not to authorize an award of costs in any of the state courts.[147]

—— **Order of appellate division.** It has been held that where, in an equity case, the appellate division reverses "with costs," and dismisses the complaint, the costs both of the trial and of the appeal are meant,[148] but that an affirmance "with costs" carries only the costs of the appeal, where the lower court had dismissed the complaint without costs.[149] In the second and third departments of the appellate division, however, it has been held that where plaintiff's judgment at special term "without costs" is reversed and the complaint dismissed by the appellate division "with costs," defendant is entitled to costs of the appeal but not to any costs at special term.[150] An affirmance of an order dismissing without costs a writ of certiorari, which, in terms "ordered that the said order be and the same is hereby wholly affirmed with costs" has been held to carry not only the costs of appeal, but also to be a direction that the respondents recover costs as in an action.[151] It will be observed that the decisions are far from harmonious, which is

[147] Stevens v. Central Nat. Bank, 168 N. Y. 560, which reversed, on this point, 35 App. Div. 35, 54 N. Y. Supp. 673.

[148] Schoonmaker v. Bonnie, 51 Hun, 34, 3 N. Y. Supp. 492. See Bogardus v. Rosendale Mfg. Co., 8 Super. Ct. (1 Duer) 592.

[149] Id.

[150] Hurley v. Brown, 55 App. Div. 8, 67 N. Y. Supp. 279. Upon the reversal of an order rendered at special term dismissing proceedings taken for a street opening, which allowed no costs to the landowner, the order of the appellate division awarded costs and disbursements. Held, that costs of the appeal only could be taxed. Matter of Board of Street Opening & Improvement, 34 App. Div. 500, 54 N. Y. Supp. 516.

[151] Wood v. Com'rs of Excise, 9 Misc. 507, 30 N. Y. Supp. 344.

partly the result of each department of the appellate division considering itself not bound by the decisions in any other department. No general rule can be laid down and with the law in such a condition it would seem advisable to always have the order explicit as by reading "with costs of this court to the appellant and with (or 'without') the costs of the trial (or 'special') term (or 'of the county court' or 'of the city court of the city of New York')."

—— **Order of court of appeals.** The words "with costs" in an order of reversal or affirmance in the court of appeals, in a case where the allowance of costs is discretionary, give costs in that court only,[152] except that when the appellate court assumes to deal with the whole subject and wipes out and reverses the judgment or decree appealed from with costs, that includes all the costs of all the inferior courts.[153] If the party who is successful in the court of appeals has been unsuccessful in the trial court, or in the trial court and the appellate division, and judgment absolute is ordered in his favor in the court of appeals, with costs, he does not thereby become entitled to the costs of the trial or special term or the appellate division, but he must apply to those courts respectively for the costs in such courts.[154] For instance, where the appellate division, in an equitable action, reverses a dismissal of the complaint and orders a new trial with costs to abide the event,

[152] Sisters of Charity v. Kelly, 68 N. Y. 628; Byrnes v. Baer, 13 Wkly. Dig. 128; Matter of Protestant Episc. Pub. School, 86 N. Y. 396; People v. Mercantile Credit Guaranty Co., 35 Misc. 755, 72 N. Y. Supp. 373; People ex rel. Morris v. Randall, 8 Daly, 81; Matter of Water Com'rs of Amsterdam, 104 N. Y. 677; Matter of Hood, 17 State Rep. 705, 49 Hun, 608, 1 N. Y. Supp. 833; Price v. Price, 61 Hun, 604, 41 State Rep. 399, 16 N. Y. Supp. 359. Rule applies where appellate division has made no award of costs. Newcomb v. Hale, 12 Abb. N. C. 338, 64 How. Pr. 400, 4 Civ. Proc. R. (Browne) 25, dist'g Sanders v. Townshend, 63 How. Pr. 343, 11 Abb. N. C. 217.

[153] Matter of Hood, 30 Hun, 472. So held on appeal from order in special proceedings. Matter of New York, W. S. & B. R. Co., 28 Hun, 505.

[154] Helck v. Reinheimer, 14 State Rep. 465, 28 Wkly. Dig. 347. Costs of appellate division cannot be granted at special term but application must be made to the appellate division. People ex rel. Keene v. Queens County Sup'rs, 83 Hun, 237, 31 N. Y. Supp. 569.

and the court of appeals affirms the appellate division and awards judgment absolute, with costs, on the stipulation therefor, the special term has power, after the filing of the remittitur, to award costs and an additional allowance.[155]

Where the appellate division modifies so as to provide for a recovery against a defendant in a certain contingency, and no costs are adjudged against the defendant as a part of such recovery, and such judgment, as so modified, is "affirmed, with costs to appellants," only costs of the court of appeals are taxable.[156]

—— **As including disbursements.** A reversal "with costs" does not include disbursements, except on appeal from a final judgment, when the successful party is entitled to charge for certain necessary disbursements.[157] If the affirmance or reversal of an order or of an interlocutory judgment is intended to carry disbursements, the order of the appellate court must expressly provide therefor.

—— **Separate bills of costs.** Where the court of appeals reverses "with costs," the lower court has no authority to give a separate bill of costs to each appellant.[158] So an affirmance "with costs to the respondents" authorizes only one bill of costs for all the respondents,[159] though where the respondents are not united in interest, it is proper to tax separate bills

[155] Barnard v. Hall, 143 N. Y. 339; Hascall v. King, 165 N. Y. 288.

[156] Newcomb v. Hale, 64 How. Pr. 400.

[157] Cassidy v. McFarland, 139 N. Y. 201, 209, followed in Bolte v. Dieckmann, 58 App. Div. 85, 68 N. Y. Supp. 444.

[158] Sweet v. Mowry, 49 State Rep. 262, 20 N. Y. Supp. 924, jt. aff. 138 N. Y. 650; Isola v. Weber, 12 App. Div. 267, 42 N. Y. Supp. 615. But if the respondent does not object and takes no appeal therefrom, a surety on an undertaking cannot raise the objection collaterally when sued thereon. Lesster v. Lawyers' Surety Co., 50 App. Div. 181, 189, 63 N. Y. Supp. 804.

[159] Van Gelder v. Van Gelder, 84 N. Y. 658. Where the defendants in an action, having answered and defended separately, were allowed separate bills of costs, but upon appeal by the plaintiff were each represented by the same counsel, the decision affirming the judgment with "costs of said appeal to the defendants" entitles them to but one bill of costs on the appeal. Fischer v. Langbein, 31 Hun, 272.

of costs.[160] Where separate appeals are taken by different parties from the same order, and the appeals are not consolidated though argued together for convenience sake, a dismissal with costs entitles the respondent to costs from both of the appellants.[161] Where appellants appeared and answered separately on the trial but united in a case on appeal, and the appellate division reversed and ordered a new trial with costs to each of the appealing parties, and the court of appeals affirmed the order with costs and awarded judgment absolute on the stipulation therefor, the appellants are entitled to a separate bill of costs on the first appeal and a joint bill on the further appeal to the court of appeals.[162]

§ 2879. Reversal or affirmance "without costs."

In an equity case, the appellate court, on reversing or affirming, may desire to do so without imposing the costs of the appeal on either party or it may intend to go farther and strike out all costs previously awarded to either party. The appellate court has the power to strike out all allowances for costs included in the judgments rendered.[163] Ordinarily an order "without costs" merely means without costs of the appellate court.[164] Thus where both parties appeal to the appellate

[160] See Reynolds v. Ætna Life Ins. Co., 30 Misc. 152, 61 N. Y. Supp. 901. Where several defendants, not united in interest, made separate defenses by separate answers, and recovered against plaintiffs separate judgments for damages in the nature of counterclaims, and the judgments were affirmed on plaintiff's appeal, with costs to respondents, they were each entitled to a separate bill of costs. New York & N. H. R. Co. v. Schuyler, 29 How. Pr. 89.

[161] Lesster v. Lawyers' Surety Co., 30 Misc. 771, 62 N. Y. Supp. 479. But it has been held where a proceeding to acquire title to lands for a railroad, in which the owners and lessees appeared by different attorneys and took separate appeals, was dismissed in the court of appeals, with costs, but one bill of costs in the supreme court and court of appeals could be taxed, and that it was error to award costs to each of the respondents. Matter of New York, W. S. & B. R. Co., 28 Hun, 505.

[162] Von Keller v. Schulting, 45 How. Pr. 139.

[163] Hogan v. Kavanaugh, 139 N. Y. 620.

[164] See McGregor v. Buell, 1 Keyes, 153.

division from a judgment for plaintiff, a reversal "without costs" relates only to costs of the appeal.[165] But where the court of appeals affirms an order granting a new trial in an equity case, and judgment absolute is ordered against the appellant "without costs" to either party, it disposes of all the costs in the action, and it is irregular to insert costs in the judgment entered on the remittitur; and the remedy therefor is by motion to correct the judgment.[166] Where an order of the court of appeals states "that the said judgment be modified, as stated in the opinion, without costs" and the appellate division had affirmed with costs, the order was held properly construed as referring merely to the costs of the court of appeals, in the absence of the opinion of the court of appeals in the printed papers.[167] On reversal "without costs" in an equity case, the clerk has no power to tax costs.[168]

§ 2880. Costs "to abide the event."

When a new trial is granted by the appellate court, costs are usually awarded "to abide the event" or "to the appellant to abide the event." "To abide the event" means to abide the final result of the action in which the costs were awarded. The final result, i. e., the event, may be reached where there is a voluntary discontinuance,[169] or where the plaintiff serves a new complaint setting up a new cause of action.[170] If costs are awarded "to abide the event," and the final event is a judgment in which neither party is wholly successful, the costs of the entire action may be refused either party.[171] Where costs are awarded to abide the event, and on the new trial

165 Sander v. New York & H. R. Co., 56 App. Div. 273, 67 N. Y. Supp. 809.

166 Patten v. Stitt, 50 N. Y. 591.

167 Callanan v. Gilman, 55 Super. Ct. (23 J. & S.) 511, 2 N. Y. Supp. 702.

168 Chase v. Miser, 67 Barb. 441.

169 Van Wyck v. Baker, 11 Hun, 309.

170 Coyle v. Third Ave. R. Co., 19 Misc. 345, 43 N. Y. Supp. 499.

171 Mandeville v. Avery, 44 State Rep. 1, 17 N. Y. Supp. 429; in which case, however, costs up to the last trial were awarded to appellant.

plaintiff recovers on several causes of action but is defeated as to others involving much more than those as to which a recovery is had, plaintiff cannot be said to have been successful on the appeal, but defendant is the successful party.[172]

It is well settled that where the court of appeals reverses a judgment "with costs to abide the event," the party finally successful in the action, even though he be the respondent, is entitled to the costs of such appeal.[173] This rule also applies to a reversal by the appellate division,[174] except in the first department.[175] In other words, an appellant may be successful on appeal and obtain a new trial "with costs to abide the event," but if he is not ultimately successful he is chargeable, if costs are finally awarded to the successful party, not only with the costs of the trials in which he was unsuccessful but also with the costs of an appeal where he was successful. If, however, costs are awarded "to appellant" to abide the event, instead of generally to abide the event, the costs of the appeal cannot be taxed against him if he is ultimately defeated.

Does the award of "costs to abide the event" mean only the costs of the appellate court or does it refer to all the costs to date? The court of appeals has answered this question by holding that the term always means all the costs of the action up to and including the decision of the court of appeals.[176]

Where the affirmance of a judgment against "executors" is reversed by the court of appeals "with costs to abide the event," and the second trial results in a judgment against the executors, the costs cannot be taxed against the executors,

[172] Abendroth v. Durant, 9 Civ. Proc. R. (Browne) 446.

[173] First Nat. Bank of Meadville v. Fourth Nat. Bank of N. Y., 84 N. Y. 469.

[174] Smith v. Smith, 22 App. Div. 319, 47 N. Y. Supp. 987; Van Wyck v. Baker, 11 Hun, 309; Loring v. Morrison, 25 App. Div. 139, 48 N. Y. Supp. 975; Abendroth v. Durant, 9 Civ. Proc. R. (Browne) 446.

[175] Union Trust Co. v. Whilton, 17 Hun, 594; Durant v. Abendroth, 48 Hun, 16, 1 N. Y. Supp. 538, followed in House v. Lockwood, 48 Hun, 550, 1 N. Y. Supp. 540.

[176] Franey v. Smith, 126 N. Y. 658; Jaffray v. Goldstone, 62 Hun, 52, 16 N. Y. Supp. 430. So held in appellate division. Smith v. Smith, 22 App. Div. 319, 47 N. Y. Supp. 987.

since they are exempted therefrom by section 1836 of the Code, where the case is not within the exceptions contained therein; and in such a case the word "event" has a more extended meaning than usual inasmuch as it means not only final success in the action but also a valid award of costs, generally, under said section 1836.[177]

§ 2881. Costs "to appellant to abide the event."

Where the court of appeals awards costs to appellant to abide the event, it refers only to the costs of the court of appeals. If the respondent is finally successful he can tax the costs of both trials and of the appeal to the appellate division.[178]

Where the appellate division awards costs "to the appellant to abide the event" and the respondent is again successful in the trial court, there is no question but that he cannot tax the costs of the appeal, and there are cases holding that he cannot tax the costs of the first trial,[179] though the weight of authority is that he can tax the costs of the first trial.[180] Where the appellate division awards costs "to the defendant to abide the event," and he is compelled, as a condition of being allowed to amend his answer, to pay "the costs of the action to the present time," such order does not deprive him of his contingent right to costs under the decision on the appeal.[181]

(B) TAXATION.

§ 2882. Procedure.

If a party to the appeal deems himself aggrieved by the order of the appellate court as to costs, his remedy is to apply

[177] Benjamin v. Ver Nooy, 168 N. Y. 578, modifying 36 App. Div. 581, 55 N. Y. Supp. 796.

[178] Belt v. American Cent. Ins. Co., 33 App. Div. 239, 53 N. Y. Supp. 363.

[179] Elliott v. Luengene, 19 Misc. 428, 43 N. Y. Supp. 1140. See, also, Cochran v. Gottwald, 42 Super. Ct. (10 J. & S.) 214.

[180] Howell v. Van Siclen, 4 Abb. N. C. 1; Bueb v. Geraty, 31 Misc. 22, 62 N. Y. Supp. 1125; Bannerman v. Quackenbush, 2 City Ct. R. 172, 2 How. Pr. (N. S.) 82, 7 Civ. Proc. R. (Browne) 428.

[181] Havemeyer v. Havemeyer, 48 Super. Ct. (16 J. & S.) 104.

to that court for an amendment of the order.[182] Otherwise the costs must be taxed according to the command of the appellate court, except where the costs are a matter of right, in which case the order of the appellate court has no effect on the right to tax. The costs are taxed in the lower court in the same way as are the costs of a trial or hearing in the lower court.[183] Where the appellate division awards costs to be taxed by the clerk "of this court" the clerk of the supreme court is meant.[184] Costs of a motion in the appellate court, where a specific sum is awarded, are enforcible independently and require no taxation.[185]

—— Form of bill of costs on appeal to the appellate division.

Supreme court, ——— county.
[Title of cause.]

Making and serving a case	$20.00 [186]
Costs before argument	20.00
Costs for argument	40.00

DISBURSEMENTS.

Clerk's fee, entry of judgment	.50
Transcript and docketing in another county	.18
Sheriff's fees on execution	.62

[182] Matter of Water Com'rs of Amsterdam, 104 N. Y. 677.

[183] See vol. 3, pp. 3026–3039. In entering judgment in the court below, upon remittitur from the court of appeals, the costs of the appeal should be adjusted by the clerk of the court below, and inserted in the entry of judgment in that court. Union India Rubber Co. v. Babcock, 1 Abb. Pr. 262, 11 Super. Ct. (4 Duer) 620. An entry of judgment upon a remittitur from the court of appeals, with the costs inserted therein as adjusted, in the absence of the attorney of the unsuccessful party, is irregular, but the whole judgment is not void, for the irregularity can be corrected by amending the judgment roll, docket, and execution. Lawrence v. Bank of Republic, 29 Super. Ct. (6 Rob.) 497. Disbursements uncertain in amount awarded by an appellate tribunal may be directed to be taxed by the clerk. Higgins v. Callahan, 2 Civ. Proc. R. (Browne) 302, 10 Daly, 420.

[184, 185] Margulies v. Damrosch, 23 Misc. 77, 51 N. Y. Supp. 833.

[186] If it exceeds fifty folios, thirty dollars may be taxed. If respondent is awarded costs, the item will be for serving amendments to the case.

Sheriff's fees on execution in another county .... .62
Postage ....
Printing case..... ....
Printing points.....
Stenographer's fees for copy.....

[Add affidavit as in form in vol. 3, p. 3030, leaving out next to last sentence.]

Taxed at $ ——— this ——— day of ———, 190—.

A. X.,
Clerk.

Retaxed at $ ——— this ——— day of ———, 190—.

A. X.,
Clerk.

Form of bill of costs on appeal to court of appeals.

Supreme court, ——— county.
[Title of cause.]

Costs before argument..... $30.00
Costs for argument..... 60.00
Term fees.....
Damages for delay.....

DISBURSEMENTS.

Filing notice of appeal..... .50
Paid for remittitur.....
Printing case..... .....
Printing points.....
Postage .....

[Affidavit of disbursements as in preceding form, and add statement "that all the requirements of rule 5 of the court of appeals has been complied with in all papers printed for use in that court."]

Taxed at $——— this ——— day, etc.

A. X.,
Clerk.

ART. VII. COLLECTION.

§ 2883. Costs on appeal from final judgment.

The costs awarded on appeal, after taxation and insertion in the judgment entered in the lower court, are enforced as a part of the judgment in the same manner that the judgment may be enforced.[187]

[187] See vol. 3, p. 3039.

§ 2884. Costs on appeal from interlocutory judgment.

If other issues remain to be tried a final judgment cannot be entered on the order of the appellate court affirming or reversing an interlocutory judgment. Costs of the appeal cannot be collected at once but must await the final outcome of the litigation and then may be added to the final judgment or set off against it.[188]

§ 2885. Costs on appeal from order.

Ordinarily the costs of appeals from orders are included in the final judgment, but no judgment can be entered in the lower court simply for such costs, as where the appeal is from an order made after the entry of final judgment. In such a case, the proper practice is to enter the order for costs and serve a certified copy thereof, and then if they are not paid within ten days thereafter, an execution against personal property may be issued, as provided for by section 779 of the Code, since costs of an appeal from an order are costs of a motion, within said section,[189] so that the failure to pay them within ten days also stays further proceedings on the part of the person liable therefor.[190]

[188] Cassavoy v. Pattison, 101 App. Div. 128, 91 N. Y. Supp. 876, and cases cited.

[189] McIntyre v. German Sav. Bank, 59 Hun, 536, 13 N. Y. Supp. 674; Carrigan v. Washburn, 18 Civ. Proc. R. (Browne) 79, 9 N. Y. Supp. 541. See vol. 2, p. 1915.

[190] Margulies v. Damrosch, 23 Misc. 77, 51 N. Y. Supp. 833; Hunt v. Sullivan, 79 App. Div. 119, 79 N. Y. Supp. 708, followed in Wasserman v. Benjamin, 91 App. Div. 547, 549, 86 N. Y. Supp. 1022. If order granting a new trial has been affirmed with costs to defendant (respondent), plaintiff must pay such costs before he can have the action restored to the calendar. Cohen v. Krulewitch, 81 App. Div. 147, 80 N. Y. Supp. 689.

PART II.

APPEALS FROM SURROGATE'S COURT.

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§ 2886. Code provisions.

The general chapter of the Code, concerning appeals, was originally declared not to apply to appeals from a surrogate's court; and though that provision has been repealed, it is believed that this principle still remains, inasmuch as a complete scheme for appeals, in the first instance, is contained in chapter eighteen of the Code in which, however, certain sections of the general chapter concerning appeals are made applicable by reference.[1] Article four of title two of chapter eighteen of the Code relates to appeals from a surrogate's court to the appellate division of the supreme court. These Code provisions (2568–2589) do not apply to an appeal from the appellate division to the court of appeals,[2] but such an appeal is regulated by the same provisions applicable to all other appeals to the court of appeals, as already treated of.

§ 2887. Decrees and orders which are appealable.

An appeal to the appellate division may be taken from a decree[3] of a surrogate's court, or from an order[4] affecting a substantial right, made by a surrogate or by a surrogate's court in a special proceeding.[5]

It will be noted that the order, to be appealable, need not be a final order. An intermediate order, or an order made after the decree is appealable if it affects a "substantial right."[6] An order determining that a person has such an interest in the estate as to entitle him to call on the executor to account

[1] Redfield, Pr. Sur. Cts. 921.

[2] Matter of Gihon's Will, 29 Misc. 273, 61 N. Y. Supp. 244.

[3] A decree, or final order, is defined by Code Civ. Proc. § 2550, as "the final determination of the rights of the parties to a special proceeding in a surrogate's court."

[4] An order is defined as "a direction of a surrogate's court, made or entered in writing, and not included in a decree." Code Civ. Proc. § 2556.

[5] Code Civ. Proc. § 2570. Under the Revised Statutes an appeal was allowed in "all" cases but the courts confined the appeals to orders affecting a substantial right.

[6] As to what is a substantial right, compare, ante, § 2552.

affects a substantial right of the executors.[7] So does an order denying a motion for the issuance of commissions to take testimony;[8] an order directing an executor to pay a legacy;[9] an order adjudging that there are assets in the hands of the administrator, which he has denied, and requiring him to account therefor;[10] an order fixing the fees of appraisers of the estate of a decedent;[11] and an order opening, vacating or modifying a decree, or granting a new trial.[12] But an order merely denying a motion to dismiss proceedings to revoke the probate of a will does not affect a substantial right,[13] nor does an order refusing to note the intervention of a party having no interest in the proceedings,[14] or an order denying an application to stay proceedings to compel the executor to pay over a legacy pending lunacy proceedings against the legatee,[15] or an order denying a motion to resettle a former order,[16] or an order denying a motion that certain issues be tried together instead of separately,[17] or an order permitting an amendment by making an answer more specific,[18] or an order denying a motion to dismiss a petition.[19]

Discretionary orders are appealable,[20] but ex parte orders are not appealable.[21]

[7] Fiester v. Shepard, 26 Hun, 183.

[8] Matter of Henry's Estate, 9 Civ. Proc. R. (Browne) 100.

[9] Matter of Halsey's Estate, 93 N. Y. 48.

[10] Matter of Gilbert's Estate, 104 N. Y. 200.

[11] Matter of Harriot's Estate, 145 N. Y. 540.

[12] People ex rel. Stevens v. Lott, 42 Hun, 408.

[13] Matter of Soule, 46 Hun, 661.

[14, 15] Matter of Halsey's Estate, 93 N. Y. 48.

[16] Matter of Halsey's Estate, 93 N. Y. 48; Matter of Sondheim's Estate, 69 App. Div. 5, 74 N. Y. Supp. 510.

[17] Matter of Henry's Estate, 9 Civ. Proc. R. (Browne) 100.

[18] Matter of Burnett, 15 State Rep. 116.

[19] Matter of Phalen, 51 Hun, 208, 4 N. Y. Supp. 408; Matter of Westurn's Estate, 5 App. Div. 595, 39 N. Y. Supp. 429; Matter of Soule, 46 Hun, 661. An order of dismissal may, however, affect a substantial right. Matter of Buckley, 2 State Rep. 673.

[20] Matter of Tilden's Will, 56 App. Div. 277, 67 N. Y. Supp. 879.

[21] Matter of Johnson's Estate, 27 Hun, 538. Order to show cause is

Nothing can be gained by taking an appeal to the appellate division from a decree admitting a will to probate, since any person interested in the will may obtain, as a matter of right, a jury trial in the supreme court to determine the validity of the probate.[22]

§ 2888. Court to which appeal to be taken.

The appeal must be taken, in the first instance, to the appellate division of the supreme court.

§ 2889. Designation of parties to appeal and title of appeal.

Section 1295 of the Code is expressly made applicable to appeals from surrogate's courts.[23]

§ 2890. Who may appeal.

Any "party" aggrieved may appeal from a decree or an order of a surrogate's court, except where the decree or order of which he complains was rendered or made on his default.[24] Of course, the right to appeal may be waived by inconsistent acts the same as other appeals.[25] An executor named in a will is a "party aggrieved" by a decree refusing to admit to probate a codicil attached to the will,[26] but an executor is not a "party aggrieved" by a decree made on his final accounting directing him to pay a legacy, where the only question is whether the legacy should be paid to the person named in the will and in the decree, or is invalid and, therefore, should be

not appealable. Matter of Kreischer's Estate, 30 App. Div. 313, 51 N. Y. Supp. 802.

[22] Matter of Beck's Will, 6 App. Div. 211, 216, 39 N. Y. Supp. 810, followed and approved in Matter of Austin's Will, 35 App. Div. 278, 55 N. Y. Supp. 52.

[23] Code Civ. Proc. § 2575.

[24] Code Civ. Proc. § 2568.

[25] See ante, §§ 2574–2590.

[26] Matter of Stapleton's Will, 71 App. Div. 1, 75 N. Y. Supp. 657 (Laughlin, J., dissenting), followed in Matter of Rayner's Will, 93 App. Div. 114, 87 N. Y. Supp. 23.

paid to the residuary legatees.[27] If the executor or administrator, on his accounting, has brought in all persons interested, he has no further duty in their behalf, and cannot appeal from the decree, save so much thereof as affects his own rights.[28] An heir at law may appeal from an order permitting a sale of the decedent's real property to pay debts.[29] A special guardian appointed by a surrogate may appeal.[30] An attorney cannot appeal from an order withdrawing, against his consent, his client's objections to the proof of a will.[31] Persons having no interest in the estate of the deceased are not aggrieved by an order settling the accounts of the executor.[32] It has been held that a petitioner for probate, where otherwise a person entitled to appeal, may appeal from an order admitting the will to probate,[33] but it would seem that this decision would not be followed under the present Code provision which limits the right to appeals to those "aggrieved."

—— **Persons not a party.** A creditor of, or a person interested[34] in, the estate or fund affected by the decree or order, who was not a party to the special proceeding, but was entitled by law to be heard therein, upon his application, or who has acquired, since the decree or order was made, a right or interest which would have entitled him to be heard if it had been

[27] Matter of Coe, 55 App. Div. 270, 66 N. Y. Supp. 784. Compare Bryant v. Thompson, 128 N. Y. 426, and Bliss v. Fosdick, 76 Hun, 508, 27 N. Y. Supp. 1053, which, however, were appeals from the supreme court. See, also, ante, § 2570.

[28] Matter of Hodgman, 140 N. Y. 421, 430; Matter of Richmond, 63 App. Div. 488; 71 N. Y. Supp. 795; Redfield, Pr. Sur. Cts. 926.

[29] Owens v. Bloomer, 14 Hun, 296.

[30] Matter of Stewart, 23 App. Div. 17, 48 N. Y. Supp. 999. He does not become functus officio by the rendition of the decree. Id.

[31] Matter of Evans' Will, 33 Misc. 671, 68 N. Y. Supp. 937.

[32] Matter of Hodgman's Estate, 11 App. Div. 344, 353, 42 N. Y. Supp. 1004.

[33] Vandemark v. Vandemark, 26 Barb. 416.

[34] The expression "person interested" includes every person entitled, either absolutely or contingently, to share in the estate or the proceeds thereof, or in the fund, as husband, wife, legatee, next of kin, heir, devisee, assignee, grantee, or otherwise except as a creditor. Code Civ. Proc. § 2514, subd. 11.

previously acquired, may intervene and appeal. The facts which entitle such person to appeal must be shown by an affidavit, which must be filed, and a copy thereof served with the notice of appeal.[35]

Even before the Codes, it was held that a legatee or devisee named in the will, but not a party to the proceedings before the surrogate for the probate of the will, could appeal from the order refusing probate, without obtaining leave to do so from the court.[36]

This Code section does not require a person included therein to intervene before seeking to appeal nor does it require him to file exceptions to the findings of the surrogate before taking an appeal.[37] A municipality which has assessed a tax against an administrator on account of the estate is "a creditor of, or person interested in," the estate so as to be authorized to appeal from an order settling the accounts of the administrator.[38] A purchaser at a sale of real estate made pursuant to a surrogate's decree may appeal from an order vacating the sale.[39] Legatees may appeal from an order denying their motion to vacate an order taxing the fees of appraisers, though they are not entitled to notice of the taxation of such fees;[40] but legatees and next of kin who have not intervened as parties either in the surrogate's court or on the appeal to the appellate division, cannot appeal to the court of appeals.[41]

§ 2891. Time to appeal.

An appeal by a party must be taken within thirty days after the service upon the appellant, or upon the attorney, if any, who appeared for him in the surrogate's court, of a copy of the decree or order from which the appeal is taken, and a written notice of the entry thereof. An appeal by a person who

[35] Code Civ. Proc. § 2569.
[36] Lewis v. Jones, 50 Barb. 645, 673.
[37, 38] Matter of Sullivan, 84 App. Div. 51, 82 N. Y. Supp. 32.
[39] Delaplaine v. Lawrence, 10 Paige, 602.
[40] Matter of Harriot's Estate, 145 N. Y. 540, 542.
[41] Marvin v. Marvin, 11 Abb. Pr. (N. S.) 97.

was not a party must be taken within three months after the entry of the decree or order, unless the appellant's title was acquired by means of an assignment or conveyance from a party, in which case, the appeal must be taken within the time limited for the taking thereof by the assignor or grantor.[42]

This provision applies only to appeals to the appellate division. A co-party cannot appeal to the court of appeals before other appeals to the appellate division by other parties, from the same judgment, have been disposed of.[43]

The rule relating to appeals in general, that the time to appeal cannot be enlarged, applies,[44] though certain omissions may be supplied.

§ 2892. Notice of appeal.

The notice of appeal must refer to the decree or order appealed from and state that the appellant appeals from the same or from a specified part thereof.[45] If the appeal is from a final order, i. e., a decree, and an intermediate order is sought to be reviewed, it must be specified in the notice.[46] The notice of appeal should be liberally construed in favor of sureties of the executor or administrator, so as to include within it all intermediate orders incidentally referred to.[47]

If the appeal is by one not a party to the proceeding in the surrogate's court, a copy of the affidavit showing the facts entitling such person to appeal, must be served with the notice of appeal.[48]

The notice of appeal need not state the grounds of the appeal nor specify that the appeal is on the facts as well as on the law, since a review on the facts may be had on a notice which

[42] Code Civ. Proc. § 2572. Service to limit time to appeal, see general rules laid down as to appeals from other courts (§§ 2602–2608).
[43] Muldoon v. Pitt, 54 N. Y. 269.
[44] See ante, § 2599.
[45] Code Civ. Proc. § 2574.
[46] Code Civ. Proc. § 2571.
[47] Matter of Lawson, 42 App. Div. 377, 381, 59 N. Y. Supp. 152.
[48] Code Civ. Proc. § 2569.

is in general terms "from the decree and each and every part thereof." [49]

—— **Mode of service.** The notice of appeal must be served within the state, upon each party to the special proceeding, other than the appellant, and upon the surrogate, or the clerk of the surrogate's court. Where a party to the special proceeding in the court below appeared in person, the notice of appeal must be personally served upon him. Where he appeared by an attorney, it must be served personally, either upon him or upon his attorney. Where a party, who was duly cited, did not appear in the surrogate's court, notice of appeal must be served upon him personally, if he can, with due diligence, be found within the county; otherwise it may be served by depositing it, indorsed with a direction to the party, with the surrogate or the clerk of the surrogate's court. Where a person to be served cannot, with due diligence, be found, to make personal service on him, the surrogate, or a justice of the supreme court, may, by order, prescribe such a mode of service as he thinks proper; and service in that mode has the same effect as personal service.[50]

§ 2893. Parties.

Each party to the special proceeding in the surrogate's court, and each person not a party, who has, or claims to have, in the subject-matter of the decree or order, a right or interest, which is directly affected thereby, and which appears upon the face of the papers presented in the surrogate's court, or has become manifest in the course of the proceedings taken therein, must be made a party to the appeal. A person not a party, but who must be made a party, may be brought in by an order of the appellate court, made after the appeal is taken, or the appeal may be dismissed on account of his absence. The appellate court may prescribe the mode of bringing in such a person, by publication, by personal service, or otherwise. But

[49] Matter of Stewart, 135 N. Y. 413. See, as contra, dicta in Matter of Gilman's Estate, 92 App. Div. 462, 87 N. Y. Supp. 128.

[50] Code Civ. Proc. § 2574. Service by mail is sufficient. Matter of Williams, 6 Misc. 512, 27 N. Y. Supp. 433.

this section does not require a person interested, but not a party, to be brought in if he was legally represented, or was duly cited in the court below.[51]

All persons should be made respondents who are interested in sustaining the decree. A person not a party may apply to be allowed to intervene on appeal.[52] A party may apply to be joined as a respondent to an appeal though his time to take a separate appeal has expired,[53] but the appellant cannot join him as a party after the time to appeal has expired.[54] If necessary parties are omitted, but no motion is made to stay or dismiss the appeal or to be allowed to intervene, and said persons have not taken an appeal themselves, a reversal is improper as to such persons.[55]

—— **Heirs, legatees, and devisees.** The heirs, next of kin, and legatees of a decedent, are necessary parties to an appeal from an order admitting the will to probate.[56] Heirs are necessary parties to an appeal taken by a creditor of the estate from an order to pay a claim out of the proceeds of the sale of the decedent's real estate.[57]

—— **Infants.** The special guardian appointed by the surrogate may be made a party instead of the infant, without appointing a guardian ad litem.[58] It has been held that where the appeal is from an order appointing a guardian, the infant is a proper but not a necessary respondent;[59] but that where the appeal is from the refusal to appoint the applicant the general guardian of an infant, the applicant should make as respondent the infant and not the relative of the infant who objected to the appointment.[60]

[51] Code Civ. Proc. § 2573.
[52] Foster v. Foster, 7 Paige, 48.
[53] Cox v. Schermerhorn, 12 Hun, 411.
[54] Patterson v. Hamilton, 26 Hun, 665.
[55] Brown v. Evans, 34 Barb. 594, 603.
[56] Gilman v. Gilman, 35 Barb. 591.
[57] Patterson v. Hamilton, 26 Hun, 665. They cannot be made parties after the appeal has expired. Id.
[58] Redfield, Pr. Sur. Cts. 927.
[59] Underhill v. Dennis, 9 Paige, 202.
[60] Kellinger v. Roe, 7 Paige, 362.

—— **Attorneys.** Counsel for contestants of a will to whom sums are allowed personally in lieu of costs are proper parties to an appeal from the order allowing such costs.[61]

—— **Substitution in case of death.** The Code rules (§§ 1297–1299) relating to the substitution of parties where death occurs after the decision appealed from, on appeals in general,[62] apply to appeals from a surrogate's court.[63]

§ 2894. Security on appeal.

Sections 2577 to 2584 of the Code apply to security to perfect the appeal and to stay proceedings. Sections 1305 to 1309 of the Code, inclusive, relating respectively to the waiver of security on appeal, the making a deposit in lieu of an undertaking, the filing of the undertaking, the compelling the execution of a new undertaking when one or more of the sureties become insolvent, and to actions on an undertaking also apply to appeals from a surrogate's court.[64]

An undertaking, whether given to perfect the appeal or to stay proceedings, must be to the people of the state; must contain the name and residence of each of the sureties thereto; must be approved by the surrogate or a judge of the appellate court; and must be filed in the surrogate's office. The surrogate may, at any time, in his discretion, make an order, authorizing any person aggrieved to bring an action upon the undertaking, in his own name, or in the name of the people. Where it is brought in the name of the people, the damages collected must be paid over to the surrogate, and distributed by him as justice requires.[65]

—— **Security to perfect appeal.** Except as otherwise specially prescribed, the filing of a proper undertaking, and service of the notice of appeal, perfect the appeal.[66] To render a notice of appeal effectual for any purpose, except [in a case

[61] Peck v. Peck, 23 Hun, 312. See, also, Gilman v. Gilman, 3 Hun, 22.
[62] See ante, § 2594.
[63] Code Civ. Proc. § 2575.
[64] Code Civ. Proc. § 2575.
[65, 66] Code Civ. Proc. § 2581.

specified in section 2578 of the Code], or where it is specially prescribed by law that security is not necessary to perfect the appeal, the appellant must give a written undertaking, with at least two sureties, to the effect that the appellant will pay all costs and damages awarded against him on the appeal, not exceeding $250.[67]

It is held, however, that in all cases the filing of an undertaking is necessary to perfect the appeal, notwithstanding that the Code section above excepts the appeals specified in section 2578 of the Code.[68]

—— **Security to stay proceedings.** An appeal perfected by the service and filing of a notice of appeal and the filing of an undertaking, operates as a stay of the proceedings to enforce the decree or order appealed from, "except as otherwise specially prescribed in this article:"[69] i. e., except (1) where the appeal is by an executor, administrator, testamentary trustee, guardian, or other person appointed by the surrogate's court, from a decree directing him to pay or distribute money, or to deposit money in a bank or trust company, or to deliver property, or by an executor or administrator from an order granting leave to issue an execution against him;[70] or (2) where the appeal from a decree or an order, directing the commitment of an executor, administrator, testamentary trustee, guardian, or other person appointed by the surrogate's court, or an attorney or counsel employed therein, for disobedience to a direction of the surrogate, or for neglect of duty, or directing the commitment of a person refusing to obey a subpoena, or to testify, when required according to law.[71] Ex-

[67] Code Civ. Proc. § 2577. Filing nunc pro tunc, see post, § 2895.

[68] Matter of Cluff's Estate, 11 Civ. Proc. R. (Browne) 338, followed in Matter of Witmark, 15 State Rep. 745.

[69] Code Civ. Proc. § 2584.

[70] Code Civ. Proc. § 2578. Effect as stay, see Stout v. Betts, 74 Hun, 266, 26 N. Y. Supp. 809; Stern v. Newberger, 15 Wkly. Dig. 133. No stay unless undertaking given. Matter of Holmes' Estate, 79 App. Div. 267, 79 N. Y. Supp. 687.

[71] Code Civ. Proc. § 2579. An undertaking given pursuant to this section, to stay proceedings, remains in force after an appeal has been taken to the court of appeals, and the perfecting of the appeal to the

cept in the two cases mentioned, a $250 undertaking given to perfect an appeal also operates as a stay of proceedings to enforce the decree.[72]

In the two cases mentioned, the Code provisions (§§ 2578, 2579) fix the contents of the undertaking to be given to stay proceedings. The sum specified in the undertaking must, where the appeal is taken from a decree directing the payment, deposition, or distribution of money, be not less than twice the sum directed to be paid, deposited, or distributed. Where the appeal is taken from an order granting leave to issue an execution, it must be not less than twice the sum, to collect which the execution may issue. In every other case, it must be fixed by the surrogate or by a judge of the appellate court who may require proof, by affidavit, of the value of any property or of such other facts as he deems proper. The respondent may apply to the appellate court, upon notice, for an order requiring the appellant to increase the sum so fixed. If such an order is granted, and the appellant makes default in giving the new undertaking, the appeal may be dismissed or the stay dissolved, as the case requires.[73]

§ 2895. Supplying defects in attempt to appeal.

Section 1303 of the Code which relates to supplying any defects in the service of the notice of appeal or the giving of an undertaking [74] is expressly made applicable to appeals from a surrogate's court.[75]

court of appeals is sufficient to stay all proceedings pending such appeal. Matter of Pye, 21 App. Div. 226, 47 N. Y. Supp. 689.

[72] Matter of Arkenburgh, 11 App. Div. 44, 41 N. Y. Supp. 287, 43 N. Y. Supp. 1150.

[73] Code Civ. Proc. § 2580. This section applies only to appeals by executors, administrators, etc. Matter of Arkenburgh, 11 App. Div. 44, 41 N. Y. Supp. 287, 43 N. Y. Supp. 1150.

[74] See ante, § 2633.

[75] Code Civ. Proc. § 2575. The surrogate's court, as well as the appellate division, may permit an undertaking to be filed after the time to appeal has expired, where the notice of appeal was seasonably served, and failure to file undertaking was because of mistake or inadvertence. Matter of Darragh, 1 Con. Surr. 170, 3 N. Y. Supp. 283.

§ 2896. Effect of appeal.

Sections 2582 and 2583 of the Code provide as to the effect of certain appeals on proceedings in the surrogate's court.

The appeal from a decree admitting a will to probate, or revoking a probate, removes the entire proceeding to the appellate division, so that an application for a rehearing cannot be made in the surrogate's court pending the appeal to the appellate division.[76]

—— **Appeal from decree admitting will to probate or granting letters.** An appeal from a surrogate's decree admitting a will to probate or granting letters, or from an order of the appellate division affirming such a decree, does not stay the issuing of letters, where, in the opinion of the surrogate, manifested by an order, the preservation of the estate requires that the letters should issue. Letters so issued confer no power, however, to sell real property as provided for in the will, or to pay or to satisfy a legacy, or to distribute the unbequeathed property of the decedent, until after the final determination of the appeal.[77]

This section authorizes the surrogate to direct the issuance of letters to an executor pending an appeal to the court of appeals from the affirmance of the order admitting a will to probate, as well as pending an appeal to the appellate division.[78]

In case letters are issued before the appeal is taken, the executor or administrator, "on a like order of the surrogate, may exercise the powers and authority, subject to the duties, liabilities, and exceptions above provided."[79] This is the concluding sentence of the Code provision under consideration, and it seems to contemplate an express order of the surrogate

[76] Matter of Murphy's Will, 79 App. Div. 541, 81 N. Y. Supp. 101.

[77] Code Civ. Proc. § 2582; In re Voorhis' Estate, 1 State Rep. 306; Matter of Place's Estate, 5 Dem. 228. This statutory stay cannot affect proceedings in other states. Matter of Gaines' Will, 83 Hun, 225, 31 N. Y. Supp. 664.

[78] Matter of Gihon's Will, 48 App. Div. 598, 62 N. Y. Supp. 426. See also, Id., 29 Misc. 273, 61 N. Y. Supp. 244.

[79] Code Civ. Proc. § 2582.

to enable executors or administrators to act pending the appeal.[80] An early case holding that a reversal of the decree admitting a will to probate, there being a new trial of the question of fact awarded, does not terminate the powers of the executor which do not cease until after the final determination of the issue of facts,[18] decided before this sentence was added, must be read in connection with this Code provision.

——**Appeal from decree revoking probate or letters or suspending representative.** An appeal from a decree revoking the probate of a will or revoking letters testamentary, letters of administration, or letters of guardianship; or from a decree or order suspending an executor, administrator, or guardian or removing or suspending a testamentary trustee, or a freeholder, appointed to execute a decree, or appointing a temporary administrator, or an appraiser of personal property, does not stay the execution of the decree or order appealed from.[82]

§ 2897. Appeal papers.

Where the appeal is taken from a decree rendered upon the trial, by the surrogate, of an issue of fact, it must be heard upon a case, to be made and settled by the surrogate, as prescribed by law for the making and settling of a case upon an appeal in an action.[83] Findings of fact and rulings on any question of law may be requested, and exceptions taken, at the time the case is settled.[84] Where the appeal is from an order. and no case is necessary, the return should consist of all papers used in the surrogate's court, necessary to a review by the appellate division. The papers must be printed and served

[80] Matter of Hopkins' Will, 95 App. Div. 57, 61, 87 N. Y. Supp. 793, which also held that it was proper in such a case, to appoint a temporary administrator, as authorized by Code Civ. Proc. § 2670.

[81] Thompson v. Tracy, 60 N. Y. 174, 181.

[82] Code Civ. Proc. § 2583; Matter of Fernbacher's Estate, 8 Civ. Proc. R. (Browne) 349; Halsey v. Halsey, 3 Dem. 196.

[83] Code Civ. Proc. § 2576. See vol. 3, pp. 2651–2682.

[84] Code Civ. Proc. § 2545.

the same as if the appeal was to the appellate division from any other inferior court.[85]

§ 2898. Review.

Until a decision is made and filed, stating separately the findings of fact and conclusions of law, there can be no hearing of the appeal.[86]

—— **Intermediate orders.** An appeal from a decree brings up for review each intermediate order specified in the notice of appeal and necessarily affecting the decree, and which has not already been reviewed by the appellate court on a separate appeal from that order.[87]

—— **Questions of law.** Each decision of the surrogate to which an exception has been taken, is brought up for review. Exceptions may be taken to a ruling by a surrogate on the trial by him of an issue of fact, including a finding, or a refusal to find, on a question of fact, the same as on the trial of an action by the court without a jury.[88] Findings of law or fact may be requested on the settlement of a case and an exception taken to the finding or the refusal to find.[89]

Only such questions of law can be considered as have been properly raised by exception; and the question whether there is "any" evidence to sustain a finding of fact is a question of law as is the question as to the propriety of refusing a finding of fact claimed to be based on uncontroverted evidence.[90] Exceptions to the findings of the surrogate are necessary to a review thereof where he himself tries the issues of fact or where a reference is ordered merely to take and report the evidence, but where a reference is ordered to hear and determine the issues it is sufficient to except to the findings of the

[85] See ante, §§ 2715 et seq.

[86] Matter of Widmayer, 52 App. Div. 301, 65 N. Y. Supp. 83. See, also, Matter of Peck's Will, 60 Hun, 583, 14 N. Y. Supp. 899; Matter of Hood's Estate, 104 N. Y. 103.

[87] Code Civ. Proc. § 2571.

[88] Code Civ. Proc. § 2545. See vol. 2, pp. 2385–2592.

[89] Code Civ. Proc. § 2545.

[90] Burger v. Burger, 111 N. Y. 523, 529.

referee without excepting to the surrogate's decree confirming or modifying the referee's report.[91]

—— **Questions of fact.** To authorize a review on the facts, after the filing of the decision, the only condition is that a case be made and settled, as on an appeal in an action, and that it contain all the evidence. It is not necessary that a motion for a new trial be first made nor that the notice of appeal specify that the appeal is taken on the facts.[92] An exception to the findings of facts is not necessary to obtain a review of the facts.[93] The case must show that it contains all of the evidence to authorize a review of the facts.[94]

Where an appeal is taken upon the facts, the appellate court has the same power to decide the questions of fact which the surrogate had; and it may, in its discretion, receive further testimony or documentary evidence, and appoint a referee.[95] Under this Code provision, the appellate court has the power to supply any finding of fact omitted from the decision or report, and the decree, which is essential to the case.[96] But while the appellate division has the same power as the surrogate to decide the facts, yet where there is no additional evidence adduced, the fact that the surrogate has seen and heard the witnesses should be given its proper weight.[97] The power to hear new evidence should be cautiously used and exercised only when the new evidence to be proposed is of importance; and where one party is allowed to give new evidence, the privilege should be extended to the other.[98]

—— **Discretion of surrogate.** Matters of discretion will not be reviewed except where the discretion has been abused.[99]

[91] Matter of Yetter, 44 App. Div. 404, 61 N. Y. Supp. 175.

[92] See ante, § 2892.

[93] So held as to review of sufficiency of evidence. Burger v. Burger, 111 N. Y. 523, 528.

[94] Matter of Hodgman's Estate, 11 App. Div. 344, 42 N. Y. Supp. 1004.

[95] Code Civ. Proc. § 2586; Matter of Landy's Will, 78 Hun, 479, 29 N. Y. Supp. 136.

[96] Matter of Snedeker, 95 App. Div. 149, 88 N. Y. Supp. 847.

[97] Matter of Arkenburgh, 38 App. Div. 473, 478, 56 N. Y. Supp. 523; Kinne v. Kinne, 2 T. & C. 391.

[98] Matter of Hannah, 45 Hun, 561.

[99] Matter of Adler, 60 Hun, 481, 15 N. Y. Supp. 227; Matter of Tilden's

The decision of the surrogate whether a gambler is, by reason of "improvidence," unfit to act as an administrator, is reviewable on appeal.[100]

Where an appeal is taken from a determination of the surrogate made on an application to open, vacate, modify, or set aside, or to enter, as of a former time, a decree or order of his court, or to grant a new trial or a new hearing for fraud, newly-discovered evidence, clerical error, or other sufficient cause; the appellate division has the same power as the surrogate and his determination must be reviewed as if the original application was made to the appellate division.[101]

—— **Objections not urged in the lower court.** Objections not urged before the referee or surrogate cannot ordinarily be urged on the appeal to the appellate division, though an objection to the jurisdiction of the surrogate's court can be first urged on appeal.[102]

—— **Questions raised by respondents.** If a respondent wishes to raise any question between himself and any of the other respondents, he must appeal from the decree.[103]

§ 2899. Judgment or order.

The appellate court may reverse, affirm, or modify the decree or order appealed from, and each intermediate order, specified in the notice of appeal, which it is authorized by law to review, and as to any or all of the parties; and it may, if necessary or proper, grant a new trial or hearing. The decree or order appealed from may be enforced, or restitution may be awarded, as the case requires, as on an appeal from judgment.[104]

Will, 56 App. Div. 277, 67 N. Y. Supp. 879; Matter of Eisner's Estate, 6 App. Div. 563, 39 N. Y. Supp. 718; Matter of Hyde, 47 State Rep. 208, 19 N. Y. Supp. 743.

[100] McMahon v. Harrison, 6 N. Y. (2 Seld.) 443.

[101] Code Civ. Proc. § 2481, subd. 6; Matter of Harlow, 73 Hun, 433, 26 N. Y. Supp. 469.

[102] Objection may be urged in court of appeals though not urged in appellate division. Fiester v. Shepard, 92 N. Y. 251.

[103] Ross v. Ross, 6 Hun, 80.

[104] Code Civ. Proc. § 2587.

It seems that no "judgment" can be entered on appeal from an order in a special proceeding.[105]

—— **Reversal for erroneous rulings on admission of evidence.** No decree or order shall be reversed for an error in admitting or rejecting evidence, unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby.[106] Error in admitting or rejecting evidence is not ground for reversal unless the appellate court is satisfied that the result would be changed if the rejected evidence was admitted or the evidence erroneously admitted was rejected;[107] but if the evidence admitted or rejected was important, and the court cannot say that, notwithstanding the error, the judgment is right, or if it entertains a reasonable doubt on the subject, there must be a reversal.[108]

—— **Award of jury trial on reversal of probate.** Where the reversal or modification of a decree by the appellate court is founded upon a question of fact, the appellate court must, if the appeal was taken from a decree made upon a petition to admit a will to probate or to revoke the probate of a will, make an order directing the trial, by a jury, of the material questions of fact, arising upon the issues between the parties. Such an order must state, distinctly and plainly, the questions of fact to be tried; and must direct the trial to take place, either at a trial term of the supreme court, specified in the order, or in the county court of the county of the surrogate.[109]

[105] Libbey v. Mason, 112 N. Y. 525.

[106] Code Civ. Proc. § 2545. Matter of Yetter, 44 App. Div. 404, 61 N. Y. Supp. 175. Where evidence stricken out is printed in the record, a reversal will not be ordered if the same conclusion would be reached with such evidence included. Matter of Rice's Will, 81 App. Div. 223, 81 N. Y. Supp. 68. This Code provision is merely declaratory of the existing law. Matter of Smith's Will, 95 N. Y. 516, 527.

[107] Snyder v. Sherman, 88 N. Y. 656, followed in Matter of White's Will, 23 State Rep. 882, 5 N. Y. Supp. 295. See, also, Clapp v. Fullerton, 34 N. Y. 190; Horn v. Pullman, 10 Hun, 473.

[108] Matter of Smith's Will, 95 N. Y. 516, 527.

[109] Code Civ. Proc. § 2588. Provision is mandatory. Valentine v. Valentine, 3 State Rep. 154. If the appellate division is in doubt as to whether the will was the free and voluntary act of the testator, a trial

This Code provision applies to a reversal on questions of fact and not on questions of law.[110] A jury trial should be ordered where the disposition which should be made of the questions of fact presented by the evidence given is not free from doubt, and the result reached in the surrogate's court is not entirely satisfactory.[111] But where there is no conflict in the facts and the appellate division differs from the surrogate's court only in the conclusion to be drawn from the facts, a question of law is presented, and a jury trial need not be ordered on reversing the decree notwithstanding the order of reversal states that the reversal was on questions of fact as well as of law.[112]

§ 2900. Remittitur.

In the appellate division of the supreme court, the order made on an appeal from a decree or an order of a surrogate's court must be entered with the clerk of the appellate division and a certified copy thereof annexed to the papers transmitted from the court below on which the appeal was heard, must be transmitted to the court from which the appeal was taken, and the court below shall enter the judgment or order necessary to carry the determination of the appellate division into effect.[113]

§ 2901. Costs.

The appellate court may award to the successful party the costs of the appeal; or it may direct that they abide the event of a new trial, or of the subsequent proceedings in the surrogate's court. In either case, the costs may be made payable

of the issues must be ordered. Matter of Brunor, 21 App. Div. 259, 47 N. Y. Supp. 681.

[110] Matter of Smith's Will, 96 N. Y. 661; Matter of Martin's Will, 98 N. Y. 193. Sufficiency of evidence held a question of law. Matter of Rapplee, 66 Hun, 558, 21 N. Y. Supp. 801.

[111] Matter of Tompkins' Will, 69 App. Div. 474, 74 N. Y. Supp. 1002; Matter of Warnock's Will, 103 App. Div. 61, 92 N. Y. Supp. 643.

[112] Matter of Hunt, 110 N. Y. 278, 282. See, also, Matter of Rayner's Will, 93 App. Div. 114, 87 N. Y. Supp. 23.

[113] Code Civ. Proc. § 2585.

out of the estate or fund, or personally by the unsuccessful party as directed by the appellate court; or, if such a direction is not given, as directed by the surrogate.[114]

In a case where the court of appeals reversed a judgment of the general term which affirmed a decree of a surrogate, but affirmed the principle upon which the decree of the surrogate, and the judgment of the general term mainly proceeded, so that both the appellant and the respondent succeeded in part in establishing their respective positions, and the order of reversal concluded as follows: "Costs in this court to be paid out of the estate," it was held that all the parties were entitled to costs, and not the appellant only.[115]

[114] Code Civ. Proc. § 2589. Costs held properly imposed on unsuccessful party, in Matter of Martin, 98 N. Y. 193.

[115] Lawrence v. Lindsey, 70 N. Y. 566.

PART III.

APPEALS TO THE COUNTY COURT.

CHAPTER.		SECTION.
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CHAPTER I.

GENERAL CONSIDERATIONS.

Scope of part, § 2902.
Appeal as exclusive remedy, § 2903.
To what court appeal to be taken, § 2904.
What may be appealed, § 2905.
Who may appeal, § 2906.

§ 2902. Scope of part.

This part, relating to appeals to the county court, will be limited to a consideration of appeals from a justice's court. Appeals from city courts, in so far as regulated by special rules, will not be treated of.

Appeals from the judgments of a justice are divided into two classes, according to whether the appellant seeks a new trial in the appellate court. The rules laid down in chapters one, two, three, four, and seven apply equally well to both classes

of appeals except where it is otherwise stated in the text. Chapter five applies only to appeals where no new trial is had, while chapter six applies exclusively to appeals where a new trial is demanded.

Much of the case law applicable to appeals to the county court has been rendered obsolete by amendments of the Codes, and no attempt has been made to more than refer to such obsolete law. Old cases have been accepted as precedents only after a careful investigation of the Code provisions to determine if there has been any change in the statutes.

§ 2903. Appeal as exclusive remedy.

"The only mode of reviewing a judgment, rendered by a justice of the peace in a civil action, is by an appeal."[1]

The Code does not permit a party against whom a judgment has been taken by default in justice court to make a strict motion in the county court for the opening of the default and the granting of a new trial, nor can he obtain any such relief in justice court. His only remedy is in the form of an appeal, which results either in the granting of a new trial, or in a judgment of affirmance upon its refusal.[2] But it has been held that this Code provision does not preclude the right of the county court to cancel of record a judgment of a justice, a transcript of which has been filed in the county court, where the judgment is void.[3]

An appeal and certiorari are concurrent remedies to review summary proceedings.[4]

[1] Code Civ. Proc. § 3044; Sammis v. Nassau Light & Power Co., 91 App. Div. 7, 86 N. Y. Supp. 243. The county judge has no power to vacate the judgment of a justice, on motion, where no appeal has been taken. Douglass v. Reilly, 8 Hun, 85. The judgment cannot be reviewed by certiorari. City of Buffalo v. Schliefer, 25 Hun, 275. County court cannot perpetually stay justice's judgment. Collier v. Van Hoesen, 6 Wkly. Dig. 49. A judgment in an action to recover a penalty for violating a city ordinance is a judgment in a "civil" action so as to be reviewable by appeal. City of Buffalo v. Schliefer, 25 Hun, 275.

[2] Kilts v. Neahr, 101 App. Div. 317, 91 N. Y. Supp. 945.

[3] Daniels v. Southard, 23 Misc. 235, 51 N. Y. Supp. 1136.

[4] People ex rel. Van Allen v. Perry, 16 Hun, 461.

§ 2904. To what court appeal to be taken.

The appeal must be taken to the county court of the county where the judgment was rendered, except where the judgment is rendered by a justice of the peace of the city of Buffalo.[5]

§ 2905. What may be appealed.

The Code title relating to appeals from a justice refers only to appeals from judgments, and it follows that no appeal can be taken from an order except where the right to appeal is expressly conferred by other Code provisions authorizing an appeal from certain orders made in summary or special proceedings or statutory actions. For instance, the Code allows an appeal from a final order in summary proceedings to recover the possession of real property,[6] or from an order determining a claim to surplus moneys remaining after the sale of animals seized when straying on a highway,[7] or from an order determining a demand for the return of the possession of such animals,[8] or from a final order made on a petition in such proceedings.[9]

A judgment by default is appealable,[10] as is a void judgment.[11]

The judgment in a proceeding to foreclose a mechanic's lien is appealable the same as other judgments.[12]

§ 2906. Who may appeal.

"An appeal may be taken by any party aggrieved by the judgment."[13] Only a party can appeal. A party who has

[5] Code Civ. Proc. § 3045. Removal where county judge is disqualified, see Code Civ. Proc. § 342. Appeals from city courts to county court, see statutes creating particular city courts.

[6] Code Civ. Proc. § 2260.

[7] Code Civ. Proc. § 3095.

[8] Code Civ. Proc. § 3102.

[9] Code Civ. Proc. § 3104.

[10] See Code Civ. Proc. §§ 3064, 3068.

[11] Striker v. Mott, 6 Wend. 465; Catlin v. Rundell, 1 App. Div. 157, 37 N. Y. Supp, 979.

[12] Code Civ. Proc. § 3409.

[13] Code Civ. Proc. § 3045. Who is a party "aggrieved" by judgment of court of record, see ante, § 2570.

not appeared before the justice but has suffered judgment to go against him by default may appeal. A co-party may appeal though the others refuse to join in the appeal.[14] The successful party may appeal.[15] Both parties may appeal, in which case the appeals must be heard together and one judgment entered.[16] A defendant as to whom the action was dismissed by stipulation is not aggrieved by the judgment, so as to be entitled to appeal.[17]

If the party entitled to appeal dies before the expiration of the time to appeal, the appeal may be taken, by leave of court, by the heir, devisee, or personal representative of the decedent, at any time within four months after his death.[18]

[14] Mattison v. Jones, 9 How. Pr. 152.
[15] Slaman v. Buckley, 29 Barb. 289.
[16] Jones v. Owen, 5 Hun, 339.
[17] Jerry v. Blair, 62 App. Div. 590, 71 N. Y. Supp. 189.
[18] Code Civ. Proc. § 785, which is made applicable to appeals from a justice by Id., § 3347, subd. 6.

CHAPTER II.

TAKING THE APPEAL.

Time to appeal, § 2907.
Notice of appeal, § 2908.
—— Signature.
—— Mode of service on the justice.
—— Mode of service on respondent.
Payment of costs and of fee for return, § 2909.
Security to perfect appeal, § 2910.
Amendments and supplying omissions, § 2911.
—— Notice of appeal.
—— Service of notice of appeal.
—— Payment of costs.

§ 2907. Time to appeal.

"An appeal must be taken within twenty days after the entry of the judgment in the justice's docket, except that, where a defendant appeals from a judgment rendered in an action, wherein he did not appear and the summons was not personally served upon him, the appeal may be taken within twenty days after the personal service upon him, on the part of the plaintiff, of written notice of the entry of the judgment, but not after the expiration of five years from the entry of the judgment."[1]

This Code provision applies solely to appeals from judgments. The time to appeal from orders made in summary and special proceedings is fixed by the Code provisions authorizing the appeal.[2] The appeal must be taken "after" the entry of the judgment; an appeal taken before the judgment is entered is premature.[3] An appeal taken within twenty days of the time of the entry of the judgment in the "docket book" is

[1] Code Civ. Proc. § 3046.
[2] See Code Civ. Proc. §§ 3095, 3102, 3104.
[3] Lewis v. Hoffman, 5 Civ. Proc. R. (Browne) 141, in which case the

timely, though not within twenty days of the entry in the justice's minutes.[4] It is not necessary for the successful party in a justice's court to give any notice to his adversary to limit the time to appeal, except where defendant defaults and the summons was not personally served. The parties must, in other cases, examine the justice's record and discover for themselves the decision of the court. However, the time to appeal from a judgment entered in docket book by a justice of the peace does not commence to run until the docket book is open to the public.[5] If the notice of appeal is not served in time, the laches can be taken advantage of only by a motion to dismiss the appeal, where that fact does not appear on the return itself.[6]

§ 2908. Notice of appeal.

"An appeal is taken by serving on the justice by whom the judgment was rendered, and on the respondent, a written notice of appeal, subscribed either by the appellant or by his attorney in the appellate court."[7] Verbal notice of appeal is insufficient.[8] The notice should be entitled as in the justice's court.[9] Formerly the statute required the notice of appeal to state the grounds of the appeal,[10] but such statement is not now necessary.

If a new trial is desired, a demand therefor must be inserted in the notice of appeal,[11] though the fact that the notice of ap-

appeal was dismissed, it being held that the notice of appeal could not be amended.

[4] Bewerlin v. Hodges, 31 State Rep. 759, 10 N. Y. Supp. 505.

[5] Reid v. Defendorf, 87 Hun, 40, 33 N. Y. Supp. 954. In this case the justice went away after entering the judgment and left the docket book in charge of a relative.

[6] Mills v. Shult, 2 E. D. Smith, 139.

[7] Code Civ. Proc. § 3046.

[8] People ex rel. Gemmill v. Eldridge, 7 How. Pr. 108.

[9] 3 Wait's Law & Pr. 591.

[10] Andrews v. Long, 19 Hun, 303; Griswold v. Van Deusen, 2 E. D. Smith, 178.

[11] Code Civ. Proc. § 3068. The right to a new trial in the county court cannot be conferred by stipulation. King v. Norton, 36 Misc. 53, 72 N. Y. Supp. 591.

peal demands a new trial in an action or proceeding where a new trial is not permissible, is not fatal, since such demand may be treated as surplusage and the appeal heard on the law.[12]

—— **Signature.** The notice must be "subscribed either by the appellant or by his attorney in the appellate court."[13]

—— **Mode of service on the justice.** "Service of the notice of appeal upon the justice must be made by delivering it to him personally, or to his clerk, appointed pursuant to law; but if the justice is dead, or if neither he nor his clerk can, after reasonable diligence, be found within the county, service of the notice upon the justice may be made, by delivering it to the clerk of the appellate court."[14]

Service by mail seems to be a "personal" service where the postman delivers the notice into the hands of the justice, within the time limited in which to appeal, especially where the justice mails his return and a receipt for the costs sent with the notice.[15]

—— **Mode of service on respondent.** "Service of the notice of appeal upon the respondent may be made, by delivering it, in any part of the state, to the respondent personally, or in one of the following methods:

"1. If the respondent is a resident of the county, by leaving it at his residence, with a person of suitable age and discretion. If he is not a resident of the county, and the person who appeared as his attorney upon the trial is a resident thereof, it

[12] Harding v. Pratt, 37 Misc. 243, 75 N. Y. Supp. 247; King v. Norton, 36 Misc. 53, 72 N. Y. Supp. 591; Kimball v. Rich, 20 State Rep. 153, 3 N. Y. Supp. 248.

[13] Code Civ. Proc. § 3046, as amended in 1882. Formerly it was held that an "indorsement" was sufficient. Horr v. Seaton, 18 Wkly. Dig. 510; Burrows v. Norton, 2 Hun, 550. Sufficiency of signature by attorney where his authority to appear is not disclosed, see Andrews v. Long, 19 Hun, 303; Albert Palmer Co. v. Dickinson, 14 Wkly. Dig. 191; Bishop v. Van Vechten, 10 Abb. N. C. 220

[14] Code Civ. Proc. § 3047. Service on clerk is equivalent to service on justice though service on justice may be as easily made. See Irwin v. Muir, 13 How. Pr. 409.

[15] Mitchell v. Watkins, 21 App. Div. 285, 47 N. Y. Supp. 339.

may be served upon the attorney, either personally, or by leaving it at his residence, with a person of suitable age and discretion.

"2. If service within the county cannot be made, with due diligence, upon the respondent personally, or in the method described in the foregoing subdivision, the notice of appeal may be served upon him, by delivering it to the clerk of the appellate court."[16]

If the respondent resides in the county, service may be (1) personal, (2) by leaving it at his residence, or, (3) if personal service or service by leaving at residence cannot be made, by delivering it to the clerk of the county court. If the respondent does not reside within the county, the service may be (1) personal, (2) by service on his attorney if the attorney resides within the county,[17] or (3) if service within the county on the respondent or the resident attorney cannot be made, by delivering it to the clerk of the county court. If the respondent is a nonresident of the county, and service cannot be made on a resident attorney, it is optional with the appellant whether to serve him personally or to deliver the notice to the clerk of the county court.[18] The service may be made on respondent personally though he resides outside the county.[19] A notice delivered to respondent's attorney but taken back again is not sufficiently served.[20] The notice cannot be served on the widow of a party who has died since the rendition of the judgment, though no administrator has been appointed.[21]

§ 2909. Payment of costs and of fee for return.

"The appellant must, at the time of serving the notice of

[16] Code Civ. Proc. § 3048. Service on a partner is service on a firm. Miller v. Perrine, 1 Hun, 620.

[17] Observe that the attorney may be served only where he is a resident of the county. Lake v. Kels, 11 Abb. Pr. (N. S.) 37. If respondent is a resident of the county, the notice cannot be served on his attorney. Andrews v. Snyder, 6 Civ. Proc. R. (Browne) 333.

[18] Lake v. Kels, 11 Abb. Pr. (N. S.) 37.

[19] Daniels v. Rogers, 36 How. Pr. 230.

[20] Earll v. Chapman, 3 E. D. Smith, 216.

[21] Clark v. Snyder, 40 Hun, 330.

appeal on the justice, unless the justice is dead, pay to the person to whom it is delivered, the costs of the action, included in the judgment, and the sum of two dollars, as the fee of the justice for making the return." [22]

The payment is necessary to perfect the appeal,[23] although, as will be hereafter noticed,[24] the failure to pay the costs or fee may be supplied by a nunc pro tunc order of the county court. The justice may waive the payment of his fee for making a return, but he cannot waive the respondent's right to the payment of the costs included in the judgment.[25]

§ 2910. Security to perfect appeal.

Security to perfect the appeal from a judgment is required only when a new trial is demanded.[26] If a new trial is demanded, the undertaking required to stay proceedings must be given at the time of the service of the notice of appeal on the justice.[27] If the undertaking is not given, the appeal may be dismissed,[28] unless the appellate court, instead of dismissing the appeal, allows an undertaking to be filed nunc pro tunc, as on appeals from courts of record.[29] Where insolvent sureties knowingly make a false affidavit, the appeal may be dismissed.[30] The right to move to dismiss the appeal because of a failure of the sureties on the undertaking to justify is

[22] Code Civ. Proc. § 3047. Historical review of Code provisions see Thomas v. Thomas, 18 Hun, 481.

[23] Goss v. Hays, 40 App. Div. 557, 58 N. Y. Supp. 35; People ex rel. Lincoln v. Saratoga Common Pleas, 1 Wend. 282.

[24] See post, § 2910.

[25] Thomas v. Thomas, 18 Hun, 481.

[26] Foley v. Foley, 17 Hun, 235. Security to perfect appeal from final order in summary proceedings to recover real property, see Code Civ. Proc. § 2262. Security to perfect appeal from orders relating to animals straying on highway, see Code Civ. Proc. §§ 3103, 3105. Liability on undertaking, see Crandell v. Bickerd, 32 Misc. 258, 66 N. Y. Supp. 352.

[27] Code Civ. Proc. § 3069.

[28] Kuntz v. Licht, 8 Hun, 14.

[29] Lake v. Kels, 11 Abb. Pr. (N. S.) 37.

[30] Elson v. Murray, 27 Hun, 536.

not waived by the service of a notice of retainer and of trial.[31] An appellant cannot be compelled to give a new undertaking on the death or insolvency of a surety.[32]

§ 2911. Amendments and supplying omissions.

"Where the appellant, seasonably and in good faith, serves the notice of appeal, on either the justice or the respondent, but omits, through mistake, inadvertence, or excusable neglect, to serve it on the other, or to do any other act necessary to perfect the appeal, the appellate court, on proof by affidavit of the facts, may, in its discretion, permit the omission to be supplied, or an amendment to be made on such terms as justice requires.[33]

This Code provision was intended to prevent all injuries to appellants arising from mere technical variances or omissions. Any act on the part of the appellant which constitutes a step in the proceeding to appeal, and which evinces his intention in good faith to perfect and prosecute his appeal is a sufficient ground for an amendment.[34]

—— **Notice of appeal.** The county court may permit an amendment of the notice of appeal,[35] as by striking out the demand for a new trial[36] or by adding a demand for a new trial,[37] or by correcting the date when the judgment was

[31] Slattery v. Haskin, 42 Hun, 86.

[32] Bonnett v. Townsend, 63 Hun, 45, 17 N. Y. Supp. 566.

[33] Code Civ. Proc. § 3049. This provision was first enacted in 1880. Prior thereto there was no power in the courts to relieve a party appealing from a judgment of a justice from any omission or neglect to do any act necessary to perfect the appeal. This Code section is copied from, and is nearly identical with, section 1303 of the Code which applies to appeals from courts of record. See ante, § 2633, for cases construing section 1303.

[34] Gutbrecht v. Prospect Park & C. I. R. Co., 28 Hun, 497.

[35] Horr v. Seaton, 18 Wkly. Dig. 510. See, also, Jerry v. Blair, 62 App. Div. 590, 71 N. Y. Supp. 189.

[36] McCarthy v. Crowley, 24 State Rep. 815, 5 N. Y. Supp. 675; O'Reilly v. Block, 23 N. Y. Supp. 670.

[37] Chatfield v. Reynolds, 18 Civ. Proc. R. (Browne) 378, 9 N. Y. Supp. 880. But, in such a case, respondent should be restored to his right to

rendered,[38] or by adding the signature of the name of appellant's attorney.[39]

—— **Service of notice of appeal.** Defects in service of the notice of appeal may be supplied, provided the notice has been seasonably, and in good faith, served on either the justice "or" the respondent.[40]

—— **Payment of costs.** Prior to the enactment, in 1880, of the Code provision now under consideration, it was held that the failure to pay the costs to perfect the appeal was a jurisdictional defect which could not be relieved from.[41] At present, however, there is no question but that the county court may permit the costs to be paid nunc pro tunc, to perfect the appeal, and the exercise of its discretion will not be reviewed by the appellate division.[42]

offer to compromise, under Code Civ. Proc. § 3070, within fifteen days. Amos v. Bradley, 15 Wkly. Dig. 262. Furthermore it has been held that such relief cannot be granted after the time to appeal has expired. Thorn v. Roods, 47 Hun, 433, which, however, is disapproved of in Doughty v. Picott, 105 App. Div. 339, 94 N. Y. Supp. 43.

[38] Walrath v. Klock, 22 App. Div. 220, 47 N. Y. Supp. 1047.

[39] Gutbrecht v. Prospect Park & C. I. R. Co., 28 Hun, 497.

[40] Where notice of appeal is improperly served, leave to serve it on the proper person may be granted by the county court. Andrews v. Snyder, 6 Civ. Proc. R. (Browne) 333.

[41] Southard v. Philips, 7 Hun, 18; Eldridge v. Underhill, 17 Hun, 241; Lewis v. Hoffman, 5 Civ. Proc. R. (Browne) 141, 145.

[42] Goss v. Hays, 40 App. Div. 557, 58 N. Y. Supp. 35, and cases cited. In Black v. Maitland, 1 App. Div. 6, 36 N. Y. Supp. 739, it was held that the county court had power, where all the costs are not paid because of a mistake of the justice, to permit the appellant to perfect his appeal by paying into court the residue of the costs.

CHAPTER III.

STAY OF EXECUTION.

Necessity for undertaking, § 2912.
Contents of undertaking, § 2913.
Sureties on undertaking, § 2914.
—— Exceptions to sufficiency.
Service and delivery of undertaking, § 2915.
—— Filing with clerk of county court as substitute.
Effect after levy, § 2916.

§ 2912. Necessity for undertaking.

If the appellant desires a stay of execution, he must give a written undertaking.[1] It is held, however, that on an appeal from a judgment dismissing a replevin suit, no undertaking is required, since no execution can issue.[2]

§ 2913. Contents of undertaking.

The undertaking must be to the effect that if the appeal is dismissed, or if judgment is rendered against the appellant in the appellate court, and an execution issued thereupon is returned wholly or partly unsatisfied, the sureties will pay the amount of the judgment, or the portion thereof remaining unsatisfied, not exceeding a sum, specified in the undertaking, which must be at least one hundred dollars, and not less than twice the amount of the judgment, or, if the judgment in the justice's court is for the recovery of a chattel, that the sureties

[1] Code Civ. Proc. § 3050. He need not join with sureties in execution thereof. Code Civ. Proc. § 811. Procedure on appeal from final order in summary proceeding to recover real property. See Code Civ. Proc. § 2262. Order to stay proceedings must be obtained on appeal from order determining demand for possession of animal seized while straying on the highway, see Code Civ. Proc. § 3103. See, also, Id., § 3105.

[2] Rich v. Conley, 64 N. Y. Supp. 333.

will pay the sum fixed by that judgment as the value of the chattel, together with the damages, if any, awarded for the taking, withholding, or detention thereof.[3]

An undertaking in the words of the statute does not make the sureties liable for the amount of a judgment recovered on a new trial in the justice's court but only "the judgment recovered in the appellate court."[4] The undertaking need not express a consideration and is sufficient though it adds the words "on said appeal" to the clause, wherein the sureties agree to pay if the judgment is affirmed "on said appeal."[4] The amount of the costs need not be stated, in addition to the amount of damages,[6] nor need the day of the rendition of the judgment be stated,[7] but an erroneous recital of the day the judgment was rendered is fatal.[8] If co-parties jointly appeal, the undertaking need not be conditioned to pay the judgment which may be recovered against "either" of them.[9] If a party dies, and his administrators appeal, the undertaking must be to pay such judgment as may be rendered against them and not such judgment as should be rendered against their intestate.[10] The sureties are liable only for the amount of the justice's judgment and not for the amount of the county court judgment where the undertaking does not refer to the judgment of the county court except as a condition on which the sureties become liable to pay the justice's judgment.[11]

The contents of the additional undertaking required on appeal from a final order in summary proceedings to recover real property is prescribed by section 2262 of the Code.

[3] Code Civ. Proc. § 3050. Additional security beyond that prescribed by statute cannot be required. People ex rel. Tomb v. Washington Common Pleas, 1 Cow. 576.

[4] Janeway v. Hoft, 22 Civ. Proc. R. (Browne) 290, 19 N. Y. Supp. 844.

[5] Doolittle v. Dininny, 31 N. 350.

[6] People ex rel. Goodrich v. Chatauqua Common Pleas, 2 Wend. 618.

[7] People ex rel. Stebbins v. Orleans Common Pleas, 2 Wend. 292.

[8] People ex rel. Jewett v. Monroe Common Pleas, 3 Wend. 426.

[9] People ex rel. Rogers v. Saratoga Common Pleas, 1 Wend. 281.

[10] People ex rel. Spencer v. Monroe Common Pleas, 1 Wend. 29.

[11] Hennion v. Kipp, 30 App. Div. 288, 51 N. Y. Supp. 960.

§ 2914. Sureties on undertaking.

The undertaking must be executed by one or more sureties, approved by the justice who rendered the judgment or by a judge of the appellate court.[12] The necessity that the sureties be approved, though not excepted to, is in contrast to appeals from courts of record in which case no approval is required unless the sureties are duly excepted to.[13]

—— **Exceptions to sufficiency.** Section 1335 of the Code, which has already been considered in connection with appeals from courts of record,[14] and which fixes the procedure for excepting to the sufficiency of the sureties, the effect of a failure to justify, etc., applies to undertakings on appeal from a judgment of a justice,[15] except in so far as it states that no approval of the sureties is necessary unless they are excepted to.[16] The sureties must be approved and, if excepted to, must justify. If they do not justify, on being excepted to, the undertaking is a nullity, though a new undertaking may be allowed to cure the defect.[17]

§ 2915. Service and delivery of undertaking.

A copy of the undertaking, with a notice of the delivery thereof, must be served with the notice of appeal, and in like manner.[18]

The delivery of the undertaking to the justice or to his clerk appointed pursuant to law, and service of a copy thereof, and of notice of the delivery thereof, stay the issue of an execution upon the judgment. If an execution has been issued, the service of a copy of the undertaking, certified by the justice or the clerk, or accompanied with an affidavit, showing that it is a copy, and that the original has been duly filed, upon

[12] Code Civ. Proc. § 3050.
[13] See Ross v. Markham, 5 Civ. Proc. R. (Browne) 81.
[14] See ante, § 2677.
[15] Code Civ. Proc. § 1350.
[16, 17] Ross v. Markham, 5 Civ. Proc. R. (Browne) 81.
[18] Code Civ. Proc. § 3050.

the officer holding the execution, stays further proceedings thereunder.[19]

The service of the copy of the undertaking on the officer holding the execution does not relieve the appellant from the duty of also serving it on the respondent.[20]

—— **Filing with clerk of county court as substitute.** Where the justice is dead, or cannot with due diligence, be found within the county, and he has no clerk, appointed pursuant to law, or the clerk cannot, with due diligence, be found within the county, the undertaking may be filed with the clerk of the appellate court. In that case, notice of the filing must be given to the respondent, as prescribed for service of a notice of appeal upon him. The filing of the undertaking has the same effect as the delivery thereof to the justice, and a copy thereof, certified by the county clerk, served upon the officer holding an execution, has the same effect as if it was certified, as prescribed in the last section.[21]

§ 2916. Effect after levy.

The service of the undertaking, after the levy of an execution, does not discharge the execution and take from the officer all right to retain the goods levied on, but merely stays all further proceedings on the execution.[22]

[19] Code Civ. Proc. § 3051.
[20] Wells v. Dawson, 43 Hun, 509.
[21] Code Civ. Proc. § 3052.
[22] Smith v. Allen, 2 E. D. Smith, 259.

CHAPTER IV.

RETURN.

Necessity, § 2917.
—— Where justice is unable to make.
Affidavits where appeal founded on error of fact not within knowledge of justice, § 2918.
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§ 2917. Necessity.

Except where the Code expressly provides that a return need not be made by the justice, it is his duty, on being paid the fee therefor, to make a return of the proceedings in the action before him. He must make a return though he has gone out of office, and such return has the same effect as if he remained in office.[1]

If no return is made, the county court cannot affirm but can only dismiss the appeal.[2]

—— **Where justice is unable to make.** If the justice dies, becomes a lunatic, absconds, removes from the state, or otherwise becomes unable to make the return, the appellate court

[1] Code Civ. Proc. § 3054. See, also, Id., § 3055.

[2] Beardsley v. Bowker, 6 Wkly. Dig. 341; Van Heusen v. Kirkpatrick, 5 How. Pr. 422. That thirty days have expired need not be affirmatively shown by party moving to dismiss. Condert v. Lias, 11 How. Pr. 264.

may receive affidavits, or examine witnesses, as to the evidence and other proceedings taken, and the judgment rendered, before the justice, and may determine the appeal, as if a return had been duly made by the justice.[3]

§ 2918. Affidavits where appeal founded on error of fact not within knowledge of justice.

Where an appeal is founded on an "error of fact,"[4] in the proceedings, not affecting the merits of the action, and not within the knowledge of the justice,[5] the court may determine the matter on affidavits[6] or, in its discretion, on the examination of witnesses, or in both methods.[7]

"Errors of fact" in the proceedings as to which affidavits or oral testimony, or both, may be received by the county

[3] Code Civ. Proc. § 3056; Bush v. Dennison, 14 How. Pr. 307; Valentine v. Kelly, 17 Civ. Proc. R. (Browne) 368, 7 N. Y. Supp. 184. This provision prescribes the remedy where the stenographic notes which constitute the minutes of the trial have been lost. Walker v. Baermann, 44 App. Div. 587, 61 N. Y. Supp. 91.

[4] The words "error of fact" do not refer to an erroneous finding of the court or jury on the evidence, but to those errors of fact which do not appear from the record or evidence, such as infancy, etc., of some of the parties. Kasson v. Mills, 8 How. Pr. 377; Biglow v. Sanders, 22 Barb. 147. They also refer to a fact outside the record, which renders the judgment void, and which, when properly alleged and proved in any action or proceeding in which the judgment comes in question, will defeat any title or right claimed under it. Willins v. Wheeler, 28 Barb. 669, 672.

[5] Affidavits cannot be read when they relate to any matter within the knowledge of the justice, since such facts must appear by the return. Gibbons v. Van Alstyne, 29 State Rep. 461, 9 N. Y. Supp. 156; Jennings v. Miller, 10 Misc. 762, 31 N. Y. Supp. 814. Affidavits relating to alleged misconduct of the justice after the case is submitted to him for decision are not permissible, since within the knowledge of the justice. Vallen v. McGuire, 49 Hun, 594, 18 State Rep. 410, 2 N. Y. Supp. 381.

[6] The affidavits should be served on the respondent with, or before, the notice of argument. Hurd v. Beeman, 8 How. Pr. 254. Counter affidavits are allowable. Adsit v. Wilson, 7 How. Pr. 64.

[7] Code Civ. Proc. § 3057; Sammis v. Nassau Light & Power Co., 91 App. Div. 7, 86 N. Y. Supp. 243.

court, include, inter alia, the failure to serve, or defects in the service or return of, the summons;[8] defects in the copy summons served;[9] the nonresidence of defendant;[10] the nonresidence of the justice who tried the case;[11] and misconduct of jurors while deliberating on their verdict.[12]

§ 2919. Time.

"The justice must, after ten and within thirty days from the service of the notice of appeal and the payment of the costs and fee, make a return to the appellate court."[13]

This Code provision does not forbid the justice to make his return before ten days,[14] and it has been said that if the return is filed after the expiration of the thirty days it will be as valid as though made within the time limited.[15] If the appeal book does not show when the return was filed, it will be presumed that it was filed within the statutory time, i. e., within thirty days.[16]

§ 2920. Compelling making of.

"The appellate court may compel the justice, by attachment, to make and file a return, or a further or amended return. The court is always open for those purposes. Where

[8] Sammis v. Nassau Light & Power Co., 91 App. Div. 7, 86 N. Y. Supp. 243; Iron Clad Mfg. Co. v. Smith, 28 Misc. 172, 59 N. Y. Supp. 332. False return of summons. Fitch v. Devlin, 15 Barb. 47.

[9] Monroe v. White, 25 App. Div. 292, 49 N. Y. Supp. 517.

[10] Griffin v. Norton, 5 State Rep. 812; Larocque v. Harvey, 19 Civ. Proc. R. (Browne) 109, 10 N. Y. Supp. 576; Willins v. Wheeler, 8 Abb. Pr. 116.

[11] Tiffany v. Gilbert, 4 Barb. 320.

[12] Rose v. Smith, 4 Cow. 17; Harvey v. Rickett, 15 Johns. 87. That affidavits of jurors will be received to sustain their verdict but not to impeach it, see vol. 3, pp. 2734, 2735.

[13] Code Civ. Proc. § 1053. No return can be compelled unless costs and return fee are first paid. Aldrich v. Ketchum, 12 N. Y. Leg. Obs. 319.

[14] Lazarus v. Ludwig, 17 Misc. 365, 40 N. Y. Supp. 63.

[15] 3 Wait's Law & Pr. 609, which cites Ex parte Kellogg, 3 Cow. 372.

[16] Zoller v. Smith, 45 Hun, 319.

the justice has removed to another county of the state, the appellate court may compel him to make the return, as if he was still within the county where the judgment was rendered."[17]

The justice cannot be compelled, however, to make a return unless his fee therefor has been paid.[18] The application to compel the justice to file a return should be based on an affidavit showing the default of the justice, and the order directing him to file a return should specify the time within which it must be filed. If it is not filed within such time, an attachment may be issued. The procedure to compel the justice to do his duty will not be noticed inasmuch as it in no way differs from other contempt proceedings except as modified by special local rules adopted by certain of the county courts.

§ 2921. Preparation.

The justice should either himself draw up the return or it should be drawn by a clerk under his direction and supervision. It is improper for the attorney to draw up the return[19] except where he acts merely as the justice's amanuensis,[20] though it is held that the mere fact that the attorney draws it up is not ground for setting it aside unless some abuse or injury to the other party is shown.[21]

§ 2922. Contents.

The contents of the return depends on whether or not the appeal is for a new trial in the county court. If the notice of appeal does not demand a new trial, the return must contain "all the proceedings, including the evidence and the judgment."[22] If the appellant has, in his notice of appeal, de-

[17] Code Civ. Proc. § 3055.
[18] Van Heusen v. Kirkpatrick, 5 How. Pr. 422.
[19] Hunter v. Graves, 4 Cow. 537; Rudd v. Baker, 7 Johns. 548.
[20] Philips v. Caswell, 4 Cow. 505.
[21] Hunter v. Graves, 4 Cow. 537.
[22, 23] Code Civ. Proc. § 3053.

manded a new trial in a case where he is entitled thereto, the justice must return "the summons together with each warrant of attachment, order of arrest, or requisition to replevy, or execution granted by him in the action, with the proof of the service thereof, the pleadings or copies thereof, the proceedings upon the trial, and the judgment, with a brief statement of the amount and nature of the claims litigated by the parties. But he need not return the evidence, or any part thereof, unless he is required so to do by the special order of the appellate court." [23]

The return should, in itself, contain a complete history of the proceedings.[24] It should appear from the return how the action was commenced, whether by voluntarily joining issue without the service of a summons or by the service of a summons; and if by service of the summons, when the summons was issued, served and returned; the time and place of joining issue; the nature of the pleadings; the various adjournments and upon whose motion the same were granted; the time and place of trial; the evidence given and the disposition of the various questions and objections arising during such trial; the verdict of the jury, if any; the judgment and the time of its rendition; and the time when the appeal papers were served.[25] The return should set forth the return of the summons, the day when the parties appeared, where issue was joined, the adjournment, if any, and the day when judgment was entered.[26]

A return that the justice issued a summons, and the time and place the summons was returned, sufficiently imports that it was served within the county.[27] So a return that the summons was personally served on defendant on a specified day by a named constable implies that the constable so returned.[28]

Either the originals or copies of the pleadings, or the substance thereof, should be included in the return.[29]

[24] Mann v. Swift, 3 Cow. 61.
[25] 3 Wait's Law & Pr. 610.
[26] Peters v. Diossy, 3 E. D. Smith, 115.
[27] Potter v. Whittaker, 27 How. Pr. 10.
[28] Avery v. Woodbeck, 5 Lans. 498.
[29] Miller v. Woodworth, 3 Hill, 529; Spring v. Baker, 1 Hilt. 526.

The return should set forth all the evidence,[30] documentary as well as oral,[31] except where the notice of appeal demands a new trial in which case none of the evidence need be inserted unless so required by a special order of the county court.[32] Where the return sets forth evidence in detail, and it does not expressly appear that some is suppressed, it is presumed that all is given.[33]

The return should show the judgment rendered,[34] and the time of rendition.

—— **Annexing notice of appeal, undertaking and other papers.** To the return must be annexed the notice of appeal and the undertaking, if any has been delivered to the justice or his clerk.[35] If other papers are merely annexed to a return, there must be some reference thereto in the return or they will not be considered;[36] though if returned with the return and referred to therein as a part of the proceedings, they will be considered though not "annexed" to the return.[37] Material facts should not be added by way of a postscript or memorandum.[38]

—— **Seal.** The return need not be under seal.[39]

§ 2923. Filing.

The justice must file the return with the clerk of the county court.[40]

[30] Orcutt v. Cahill, 24 N. Y. 578.

[31] McChesney v. Lansing, 18 Johns. 388; Ogden v. Sanderson, 3 E. D. Smith, 166.

[32] Code Civ. Proc. § 3053; McCann v. Sheeke, 5 Wkly. Dig. 420.

[33] Orcutt v. Cahill, 24 N. Y. 578.

[34] Woodside v. Pender, 2 E. D. Smith, 390. No particular phraseology is required, however. Slaman v. Buckley, 29 Barb. 289.

[35] Code Civ. Proc. § 3053. If notice of appeal not annexed, the appeal may be dismissed. Cabre v. Sturges, 1 Hilt. 160.

[36] Spring v. Baker, 1 Hilt. 526.

[37] Stolp v. Van Cortland, 3 Wend. 492.

[38] Logue v. Gillick, 1 E. D. Smith, 398.

[39] Scott v. Rushman, 1 Cow. 212.

[40] Code Civ. Proc. § 3053; King v. Norton, 36 Misc. 53, 72 N. Y. Supp. 591.

§ 2924. Conclusiveness.

The return is conclusive as to the facts stated therein and cannot be contradicted by affidavits. If the return is false, the remedy is by an action against the justice.[41] If the return is incomplete, the remedy is by a motion for a further or amended return. For instance, facts stated by a justice in his return cannot be contradicted by recitals in a written motion made before the justice and attached to the return, but the remedy, if the return is incorrect, is by moving for a further return.[42]

§ 2925. Further or amended return.

If the return is defective, the county court may direct the justice to make a further or amended return, as often as is necessary.[43] The return will not be set aside because incorrect, untrue, or defective in its statements, but instead an amended return will be ordered. It is proper to direct a further return to show whether the justice attended within an hour of the time fixed for an adjourned trial, where the original return so states only inferentially,[44] or where it is not shown how the justice disposed of a material question as to the admissibility of evidence,[45] or where it is uncertain as to the exact time when a demand for a jury trial was made in the justice's court.[46] However, the county court will not order the cause to stand over until a further return is made where it is entirely clear that the supplying of the omission will have no effect on the decision.[47] Thus, an amended return may be refused where it is clearly apparent that the judg-

[41] Suiter v. Kent, 12 App. Div. 599, 43 N. Y. Supp. 137; Thompson v. Sheridan, 80 Hun, 33, 29 N. Y. Supp. 868; Collier v. Van Hoesen, 6 Wkly. Dig. 49.

[42] Suiter v. Kent, 12 App. Div. 599, 43 N. Y. Supp. 137.

[43] Code Civ. Proc. § 3055; Mull v. Ingalls, 62 App. Div. 631, 71 N. Y. Supp. 1142.

[44] Flint v. Gault, 15 Hun, 213.

[45] Matthews v. Fiestel, 2 E. D. Smith, 90.

[46] Sherman v. Green, 90 Hun, 462, 36 N. Y. Supp. 53.

[47] Keeler v. Adams, 3 Caines, 84.

ment must be reversd.[48] A justice cannot be permitted to make an amended return which will absolutely contradict the first return, since the remedy is an action against the justice for a false return.[49]

The order for a further return may be granted of the court's own motion, on the motion of a party, or even on the motion of the justice himself.[50] The facts to support the motion must be made to appear by affidavit.

—— **Compelling making of return.** The appellate court, i. e., the county court, may compel the justice, by attachment, to make and file a further or amended return.[51]

—— **Order.** The order requiring an amended return should specify the time within which such return must be made. It may require the justice to answer specific interrogatories in regard to matter material to the case.[52] The order for an amended return may be reviewed on an appeal from the judgment of the county court.[53]

§ 2926. Liability of justice for false return.

A justice acts ministerially in making a return and hence he is liable for all damages sustained by an appellant by reason of a false return.[54] But in an action against a justice for a false return, it must be shown that appellant was injured by the return made, i. e., that he would have been successful if a proper return had been made.[55]

[48] Wightman v. Clapp, 2 Cow. 517.
[49] Bennett v. Taylor, 70 Hun, 51, 23 N. Y. Supp. 1094.
[50] See Simpson v. Carter, 5 Johns. 350.
[51] Code Civ. Proc. § 3055.
[52] Smith v. Johnston, 30 How. Pr. 374.
[53] Barber v. Stettheimer, 13 Hun, 198.
[54] MacDonell v. Buffum, 31 How. Pr. 154.
[55] Millard v. Jenkins, 9 Wend. 298.

CHAPTER V.

REVIEW AND JUDGMENT WHERE NEW TRIAL NOT HAD.

Stipulation for reversal, § 2927.
Bringing case on for hearing, § 2928.
On what papers appeal heard, § 2929.
—— Appeal from default judgment.
Hearing where both parties appeal, § 2930.
Scope of review, § 2931.
—— Questions first urged in county court.
—— Necessity for exceptions.
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—— Error in admitting or excluding evidence.
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—— Reversal, modification, or new trial.
—— Setting off costs against recovery.
—— On appeal from a default.
Restitution, § 2935.
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Procedure in lower court where new trial ordered, § 2937.
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§ 2927. Stipulation for reversal.

If the case is one where the appellant is not entitled to, or has not demanded, a new trial in the appellate court, the respondent may, within twenty days of the service on him of the notice of appeal, serve upon the appellant or his attorney a written stipulation that the judgment appealed from may be reversed with five dollars costs and disbursements of the appeal, and thereafter no further steps shall be taken in such ap-

peal, except to enter judgment in pursuance of such stipulation for the enforcement thereof.[1]

If the judgment can be sustained on any theory, though not the one on which the case was tried, it is not advisable to resort to this remedy.[2]

§ 2928. Bringing case on for hearing.

In case no stipulation for reversal is served, the appeal may be brought to a hearing in the appellate court at any term thereof at which such an appeal can be heard, held after the return is filed, upon a notice by either party of not less than eight days. It must be placed upon the calendar, and must continue thereupon without further notice until it is finally disposed of. If, after being regularly placed upon the calendar, neither party brings it to a hearing before the end of the second term thereafter at which it might be noticed for hearing and heard, the court must dismiss the appeal unless it directs the same to be continued for cause shown.[3]

After serving a notice of argument, the party should file a note of issue with the clerk of the county court.

If the case is regularly noticed for argument and placed on the calendar, it will remain on the calendar at subsequent terms without any further notice by either party, but the case cannot be brought on for argument at any subsequent term, except by motion, of which at least eight days' notice must be given.[4]

§ 2929. On what papers appeal heard.

The appeal must be heard on the original papers, or a certified copy thereof, and a copy or copies thereof need not be furnished for the use of the court.[5] The appeal is heard on the

[1] Code Civ. Proc. § 3062.
[2] 3 Wait's Law & Pr. 604.
[3] Code Civ. Proc. § 3062.
[4] Matthews v. Arnold, 14 Hun. 376.
[5] Code Civ. Proc. § 3063.

return alone except (1) where the appeal is founded on an error of fact in the proceedings, not affecting the merits of the action, and not within the knowledge of the justice,[6] or (2) where the appeal is taken from a default judgment and the defendant seeks to excuse his default.[7] In the two cases mentioned, in addition to the return, affidavits must be prepared and served on respondent together with the notice of argument.

—— **Appeal from default judgment.** If the appeal is taken by a defendant who failed to appear before the justice, either on the return of the summons or at the time to which the trial of the action was adjourned, the judgment will not be set aside or proceedings stayed thereunder unless defendant shows "by affidavit or otherwise, that manifest injustice has been done, and renders a satifactory excuse for his default."[8]

The ordinary practice is to make the showing by affidavit which must show (1) manifest injustice and (2) a satisfactory excuse for the default. The affidavit must state the "facts" from which the conclusion of manifest injustice may be drawn.[9] Defendant's affidavit is not, of itself, sufficient to show manifest injustice, if it is fully contradicted by plaintiff and other witnesses.[10] The affidavit must clearly show the existence of a defense.[11] The affidavits of other witnesses than defendant should also be produced, if possible to show that a defense exists. If the defendant cannot produce the affidavit of any witness, he should at least show that there are witnesses who refuse to give their affidavits, and who have knowledge of facts to which they can be compelled to testify, and which, if proved, would reduce or disprove the plaintiff's claim.[12] There is some question as to the propriety of allow-

[6] See ante, § 2918.

[7] See post, next paragraph.

[8] Code Civ. Proc. § 3064.

[9] Bates v. Gorman, 8 Civ. Proc. R. (Browne) 180; Monroe v. White, 25 App. Div. 292, 49 N. Y. Supp. 517.

[10] Gardner v. Wight, 3 E. D. Smith, 334.

[11] Young v. Conklin, 3 Misc. 122, 23 N. Y. Supp. 993.

[12, 13] Lent v. Jones, 4 E. D. Smith, 52.

ing counter-affidavits,[13] but the settled practice of the court is to receive such affidavits.[14]

§ 2930. Hearing where both parties appeal.

If both parties appeal, the appeals should be heard together.[15]

§ 2931. Scope of review.

The review is not confined to jurisdictional errors or errors affecting the merits of the action.[16] Whether the verdict is against the weight of evidence may now be reviewed.

—— **Questions first urged in county court.** Objections cannot be first urged in the county court[17] unless they could not have been obviated in the justice's court, as where the objection is to the jurisdiction of the justice over the subject-matter.[18] It cannot be first urged in the county court that the evidence was insufficient to warrant a recovery by plaintiff.[19]

—— **Necessity for exceptions.** An exception is not necessary to preserve questions for review.[20]

—— **Presumptions.** The judgment is to be sustained by every reasonable and warrantable intendment.[21] In other words, the presumption is that error was not committed,[22] and hence the party alleging error must make it appear with reasonable certainty.[23]

[14] 3 Wait's Law & Pr. 643.

[15] Jones v. Owen, 5 Hun, 339; Glassner v. Wheaton, 2 E. D. Smith, 352.

[16] Fritze v. Pultz, 2 Civ. Proc. R. (Browne) 142.

[17] Eldredge v. McNulty, 45 How. Pr. 440; Duntz v. Duntz, 44 Barb. 459; Winters v. McMahon, 23 Wkly. Dig. 119. Objections to summons. Lindsay v. Tansley, 44 State Rep. 653, 18 N. Y. Supp. 317. Objections to amount of recovery. Maxon v. Hall, 12 Wkly. Dig. 519.

[18] Post v. Black, 5 Denio, 66.

[19] Smith v. Hill, 22 Barb. 656; Judson v. Havely, 59 N. Y. Supp. 1018.

[20] Collins v. Rockwood, 64 How. Pr. 57, 60; Meech v. Brown, 1 Hilt, 257; Roe v. Hanson, 5 Lans. 304.

[21] Rickey v. Christie, 40 Hun, 278, 285; Wilson v. Elwood, 28 N. Y. 117; Sebring v. Stryker, 10 Misc. 289, 30 N. Y. Supp. 1053.

[22] Steele v. Wells, 56 N. Y. Supp. 367.

[23] Hayes v. Maytham, 20 Wkly. Dig. 337.

§ 2932. Amendments.

The county court may allow an amendment to prevent a reversal, where it does not affect the merits. But an amendment will not be allowed on appeal where it will not cure the error committed by the justice.[24] So the county court cannot amend the justice's judgment by adding another party as a judgment debtor.[25] The order allowing an amendment may impose terms.[26]

§ 2933. Grounds of reversal.

The county court "must render judgment according to the justice of the case, without regard to technical errors or defects, which do not affect the merits." [27] For instance, objections to the form of process are to be disregarded as technical.[28] The judgment must be sustained unless some vital error has been committed, especially where the judgment is by default.[29] The party who prevails in the justice's court is entitled to have the judgment so construed on appeal as to sustain it if possible.[30] But while the appeal must be decided according to the justice of the case, yet the county court will reverse for slight errors where it appears uncertain as to which party should be successful.[31] The judgment may be reversed for any error in the proceedings, whether of law or fact, which affects the substantial rights of the appellant.[32]

[24] American Book Co. v. Watson, 24 Misc. 524, 53 N. Y. Supp. 974.

[25] Elster v. Goodyear, 55 App. Div. 190, 66 N. Y. Supp. 951.

[26] O'Neill v. Morris, 28 Misc. 613, 59 N. Y. Supp. 1075.

[27] Code Civ. Proc. § 3063; Osincup v. Nichols, 49 Barb. 145. Especially should this rule be enforced where defendant appears and answers but does not defend. Marble v. Towman, 5 App. Div. 613, 39 N. Y. Supp. 350.

[28] Cornell v. Bennett, 11 Barb. 657. See, also, Griffin v. Jackson, 36 State Rep. 110, 13 N. Y. Supp. 321.

[29] Bell v. Moran, 25 App. Div. 461, 464, 50 N. Y. Supp. 982; Helmick v. Churchill, 92 Hun, 524, 36 N. Y. Supp. 1028.

[30] Putnam Foundry & Mach. Co. v. Young, 55 App. Div. 623, 67 N. Y. Supp. 16.

[31] Strawbridge v. Vandenburgh, 32 State Rep. 493, 10 N. Y. Supp. 610.

[32] Fritze v. Pultz, 2 Civ. Proc. R. (Browne) 142.

The rule is to be liberal in reviewing the proceedings of justices' courts as respects regularity and form but strict in holding them to the exact limit of jurisdiction prescribed by the statute.[33]

The county court will not be astute to discover errors in proceedings of a justice in cases of default where the defendant refuses to appear.[34]

It is ground of reversal that the justice enters the jury room and, on request, informs the jury that a verdict for plaintiff will carry costs,[35] but not that, on request, he read the jury a part of the testimony, in the absence of the parties or their attorneys.[36]

—— **Error in admitting or excluding evidence.** Error in admitting or excluding evidence is not ground of reversal if the county court is satisfied that the judgment is right.[37]

—— **Verdict or decision against the weight of evidence.** Prior to the 1900 amendment of section 3063 of the Code, a county court was not permitted to reverse a justice's judgment because against the weight of evidence. Until this amendment the rule was that where there was evidence on both sides, with only slight evidence in support of the judgment, the county court was not authorized to reverse the judgment, though it arrived at a conclusion on the facts different from that drawn by the justice or jury.[38] The county court, by such amendment,

[33] Handshaw v. Arthur, 9 App. Div. 175, 41 N. Y. Supp. 61; Jones v. Reed, 1 Johns. Cas. 20; Baker v. Dumbolton, 10 Johns. 240.

[34] Helmick v Churchill, 92 Hun, 524, 36 N. Y. Supp. 1028.

[35] Abbott v. Hockenberger, 31 Misc. 587, 65 N. Y. Supp. 566.

[36] Welker v. Allen, 39 Misc. 523, 80 N. Y. Supp. 382.

[37] Crook v. Harper, 8 Daly, 53; Hedden v. Nederburg, 28 Misc. 233, 58 N. Y. Supp. 1065. Error in the admission of evidence, where it does not affect the merits is to be disregarded. Frink v. Stevens, 88 Hun, 283, 34 N. Y. Supp. 411; Merris v. Hunt, 71 Hun, 483, 24 N. Y. Supp. 976; Davison v. Luckman, 45 State Rep. 727, 18 N. Y. Supp. 663. But where there is not other sufficient evidence to sustain the judgment, the error is ground for reversal. Carter v. Pitcher, 87 Hun, 580, 34 N. Y. Supp. 549.

[38] Clark v. Daniels, 29 App. Div. 601, 51 N. Y. Supp. 177. But even before the amendment, a review was proper where the question was as

has no greater power over judgments rendered by justices, than has the appellate division over judgments of courts and referees, and cannot reverse because the verdict or decision is against the weight of the evidence unless the verdict or decision is so plainly against the weight of evidence that it can be seen that the justice or jury could not reasonably have arrived at the verdict or decision rendered.[39] There should be a reversal where there is no conflict of evidence and the judgment is contrary to clear, undisputed and unimpeached testimony.[40]

§ 2934. Judgment.

The appellate court may affirm or reverse the judgment of the justice in whole or in part, and as to any or all of the parties, and for errors of law or of fact, and where the judgment is contrary to or against the weight of evidence, the appellate court may, on its reversal of a judgment, order a new trial before the same justice, or before another justice of the same county to be designated in the order, and at a time and place to be specified in the order.[41]

If, pending an appeal from the order of the county court granting a new trial, the proceedings are stayed, the county court, after the affirmance by the appellate division, may fix another date for the hearing before the justice.[42]

—— **Reversal or dismissal.** A judgment rendered without jurisdiction should be reversed, instead of dismissing the appeal.[43]

—— **Reversal in part.** It is proper to affirm in part and reverse in part where the judgment is for different claims, or is for distinct items or articles of property, separable in their

to the conclusion to be drawn from the evidence instead of one arising on conflicting testimony. Robinson v. Rowland, 26 Hun, 501.

[39] Murtagh v. Dempsey, 85 App. Div. 204, 83 N. Y. Supp. 296; Brewer v. Califf, 103 App. Div. 138, 92 N. Y. Supp. 627.

[40] Strong v. Walton, 27 Misc. 302, 307, 58 N. Y. Supp. 761, and cases cited.

[41] Code Civ. Proc. § 3063.

[42] Velsey v. Velsey, 40 Hun, 471.

[43] Kucklo v. Kleis, 15 Civ. Proc. R. (Browne) 431, 2 N. Y. Supp. 358.

nature, and capable of being separated on the record, both as to identity and value;[44] but a reversal in part is not proper where the damages are allowed for a single claim or cause of action, not in its nature divisible.[45]

—— **Reversal, modification, or new trial.** The county court cannot, on reversing, direct a judgment for a specified sum.[46] It may, however, make a conditional reduction of the damages even in an action based on a tort.[47]

—— **Setting off costs against recovery.** If, upon the appeal, a sum of money is awarded to one party, and costs are awarded to the adverse party, the appellate court must set off the one against the other, and render judgment for the balance.[48]

—— **On appeal from a default.** If the appeal is taken by a defendant, who failed to appear before the justice, either upon the return of the summons, or at the time to which the trial of the action was adjourned, and he shows, by affidavit or otherwise, that manifest injustice has been done, and renders a satisfactory excuse for his default, the appellate court may in its discretion, set aside the judgment appealed from, or stay proceedings thereunder, and by order direct a new trial before the same justice, or before another justice of the same county designated in the order, at such a time and place, specified in the order, and upon such terms as it deems proper.[49]

The purpose of this statute is to provide a remedy for any fraud practiced, or improper means employed, by a party to induce his adversary not to appear before a justice, either on

[44] Shaw v. Davis, 55 Barb. 389, 403; Staats v. Hudson River R. Co., 39 Barb. 298.

[45] Kasson v. Mills, 8 How. Pr. 377.

[46] Manheim v. Seitz, 21 App. Div. 16, 47 N. Y. Supp. 282; City of Brooklyn v. Brooklyn City & N. R. Co., 11 App. Div. 168, 42 N. Y. Supp. 371; Hewitt v. Ballard, 16 App. Div. 466, 44 N. Y. Supp. 935.

[47] Powers v. Hanford, 7 App. Div. 343, 39 N. Y. Supp. 936; La Motte v. Archer, 4 E. D. Smith, 46.

[48] Code Civ. Proc. § 3059; Southard v. Becker, 15 Misc. 436, 37 N. Y. Supp. 927.

[49] Code Civ. Proc. § 3064. Appellant must "render a satisfactory excuse for his default." De Bevoise v. Ingalls, 88 Hun, 186, 34 N. Y. Supp. 413.

the return of the summons or at the time to which the trial was adjourned, or when such failure was occasioned by accident or mistake or other misadventure. It does not apply to a voluntary abandonment of the case, as where the defendant appears and is sworn as a witness for the plaintiff, but refuses to answer when the case is called or to take any part in the trial.[50] The power to relieve is not confined, however, to cases where defendant does not answer on the return day, but extends to a case where he appears and pleads but fails to attend on the adjourned day set for trial.[51]

The default cannot be opened by the county court until a return has been made.[52]

The exercise of this discretionary power is not reviewable.[53] Matters relating to the affidavit have already been considered.[54]

§ 2935. Restitution.

Where the judgment of the justice is reversed or modified, the appellate court may make or compel restitution of property or of a right, lost by means of the erroneous judgment; but not so as to affect the title of a purchaser, in good faith and for value, of property sold by virtue of a warrant of attachment in the action, or an execution issued upon the judgment. In that case, the appellate court may compel the value, or the purchase price, to be restored, or deposited to abide the event of the action, as justice requires. Six days' notice of an application for an order for restitution must be given, and if the application is granted before judgment, the proper direction may be included therein.[55]

[50] Thomas v. Keeler, 52 Hun, 318, 5 N. Y. Supp. 359; Risley v. Van Delinder, 17 Misc. 661, 41 N. Y. Supp. 402. See, also, Brown v. Niagara Mach. Co., 7 N. Y. Supp. 514.

[51] Armstrong v. Craig, 18 Barb. 387.

[52] Kellock v. Dickinson, 5 App. Div. 515, 39 N. Y. Supp. 38.

[53] Tucker v. Pfau, 70 Hun, 59, 23 N. Y. Supp. 953.

[54] See ante, § 2629.

[55] Code Civ. Proc. § 3058. This remedy is not exclusive so as to preclude relief by action. Haebler v. Myers, 132 N. Y. 363.

The county court will order restitution where it is shown by a transcript from the docket that the judgment appealed from has been satisfied.[56] Where the judgment of reversal is not final, it is not a matter of right to have restitution ordered.[57]

In summary proceedings, where the county court reverses the final order in favor of the landlord, it may award restitution of the property.[58]

Restitution should not be ordered unless applied for on the hearing.[59]

§ 2936. Rehearing.

After a reversal by the county court, it cannot open the judgment on affidavits relating to the legal questions involved.[60]

§ 2937. Procedure in lower court where new trial ordered.

Where a new trial is directed before a justice, the parties must appear before him at the time and place specified in the order of the appellate court, without service of any notice or of a copy of the order. Thereupon the like proceedings must be had in the action, as upon the return of a summons personally served.[61]

§ 2938. Judgment roll.

The clerk, immediately after entering final judgment upon the determination of an appeal, must attach together and file such of the following papers as were used upon the appeal, which constitute the judgment roll:

1. The return of the justice, or a certified copy thereof; the

[56] Hunt v. Westervelt, 4 E. D. Smith, 225; Kennedy v. O'Brien, 2 E. D. Smith, 41.

[57] Cushing v. Vanderbilt, 7 Daly, 512.

[58] Knox v. McDonald, 25 Hun, 268. See, also, Wolcott v. Schenk, 16 How. Pr. 449.

[59] Frost v. Frost, 16 Misc. 430, 39 N. Y. Supp. 856.

[60] Armstrong v. Sandford, 60 Hun, 356, 14 N. Y. Supp. 840.

[61] Code Civ. Proc. § 3065.

notice of appeal; and the undertaking, if any has been given.

2. The verdict, report, or decision, and each offer, if any, made as prescribed in article third of this title.

3. A certified copy of the judgment, together with each notice of exceptions, or case, which is then on file.

4. Every other paper, then on file, and a certified copy of every order, which in any way involves the merits, or necessarily affects the judgment.[62]

[62] Code Civ. Proc. § 3061.

CHAPTER VI.

NEW TRIAL IN COUNTY COURT.

Actions in which demandable, § 2939.
Procedure where new trial not allowable, § 2940.
Procedure on new trial, § 2941.
—— Pleadings and amendment thereof.
—— Evidence admissible.
—— Review of questions raised before justice.
—— Dismissal of appeal.
—— Reference.
—— New trial.

§ 2939. Actions in which demandable.

A trial de novo is not permissible on an appeal from a judgment of a justice's court or by a justice of the peace in the city of Brooklyn, or in any of the towns in the county of Kings. On all other appeals from a justice the appellant may, in his notice of appeal, demand a new trial in the county court, and he is entitled thereto, whether or not defendant was present at the trial, provided (1) that an issue of fact or an issue of law was joined before the justice,[1] and (2) the sum for which judgment was demanded by either party in his pleadings exceeds fifty dollars or, where in an action to recover a chattel, the value of the property as fixed, together with the damages recovered, if any, exceeds fifty dollars.[2]

This Code provision is mandatory In the cases mentioned, a new trial is demandable as a matter of right. In other cases, no new trial in the county court can be obtained. The right to such new trial cannot be conferred by stipulation.[3]

The amount claimed in the pleadings, and not the amount

[1] Issue must have been joined in justice's court Thorn v. Roods 47 Hun, 433; McCann v. Sheeke, 5 Wkly. Dig. 420.

[2] Code Civ. Proc. § 3068.

[3] King v. Norton, 36 Misc. 53, 72 N. Y. Supp. 591.

of the claim actually litigated, governs the right to a new trial.[4] If either the complaint or the answer contains a demand for judgment for more than fifty dollars, the appellant may demand a new trial in the county court. There is some question, however, whether the answer authorizes a new trial, where it merely alleges that the plaintiff is indebted to defendant in a specified sum exceeding fifty dollars but contains no demand for a judgment exceeding said sum,[5] though the weight of authority holds that an answer which sets up a counterclaim only as matter of defense, without demanding an affirmative judgment for more than fifty dollars does not entitle the defeated party to a new trial in the county court.[6] If the counterclaim is entirely unauthorized, as where it is not connected with plaintiff's cause of action, it cannot be considered as giving the right to demand a new trial, though it asks for judgment for more than fifty dollars.[7] But it matters not that the amount for which judgment is demanded in the counterclaim is fictitious and fixed at a larger amount merely to obtain a new trial,[8] if the counterclaim is a proper one. A new trial may be had in the county court on an appeal from a judgment ordering the sale of twenty-eight head of cattle as strays on the highway, though their value is not shown, since it will be presumed that their value exceeds fifty dollars.[9]

In an action of replevin, a new trial is demandable where the value of the property is fixed by the pleadings at a sum exceed-

[4] Hayes v. Kedzie, 11 Hun, 577.

[5] See Matteson v. Hall, 64 How. Pr. 515.

[6] Green v. Waite, 33 Hun, 191; Royce v. Gibbons, 50 Hun, 341, 3 N. Y. Supp. 106; Dudley v. Brinckerhoff, 13 Civ. Proc. R. (Browne) 92. Compare, as contra, Matteson v. Hall, 64 How. Pr. 515.

[7] Hinkley v. Troy & A. Horse R. Co., 42 Hun, 281; Hall v. Werney, 18 App. Div. 565, 46 N. Y. Supp. 33. A counterclaim in an answer which is clearly improper and sham cannot be made the basis of a demand for a new trial in the county court. Moore v. Trimmer, 17 Civ. Proc. R. (Browne) 99, 6 N. Y. Supp. 430. See, also, Harvey v. Van Dyke, 66 How. Pr. 396; Denniston v. Trimmer, 27 Hun, 393.

[8] Baum's Castorine Co. v. Thomas, 92 Hun, 1, 37 N. Y. Supp. 913; Thompson v. Pine, 5 Hun, 647.

[9] Harding v. Pratt, 37 Misc. 243, 75 N. Y. Supp. 247.

ing fifty dollars, as well as where it is determined by the judgment of the justice.[10] On the other hand, a new trial is also a matter of right, in such a case, though the sum for which judgment was demanded in the complaint did not exceed fifty dollars, where the damages actually recovered, added to the fixed value of the property, exceeds that sum.[11]

The amount demanded in the pleadings on which the judgment is based, and not in the original pleadings which have been amended, fixes the right to appeal for a new trial.[12] Thus, the plaintiff, by amending his complaint so as to reduce his demand to fifty dollars, may prevent a new trial in the county court, where defendant does not appear, though defendant is given no notice of the application to amend and has failed to appear because he relied on his right to a new trial in the county court.[13]

A new trial in the county court cannot be had in summary proceedings to recover real property.[14]

§ 2940. Procedure where new trial not allowable.

It has been held that, if the appeal for a new trial is improper, the motion to dismiss the appeal may be refused and the notice of appeal amended so as to make the appeal one other than for a new trial, provided the time to appeal has not expired; but if the time to appeal has expired the appeal must be dismissed.[15] This decision seems to be overruled, however, by a late case, in so far as it holds that the appeal must be dismissed if the time to appeal has expired.[16] The motion to transfer the case

[10] Reynolds v. Swick, 35 Hun, 278; Merrill v. Pattison, 44 How. Pr. 209.

[11] Merrill v. Pattison, 44 How. Pr. 289.

[12] Hinkley v. Troy & A. Horse R. Co., 42 Hun, 281.

[13] Risley v. Van Delinder, 17 Misc. 661, 41 N. Y. Supp. 402.

[14] Brown v. Cassady, 34 Hun, 55.

[15] Thorn v. Roods, 47 Hun, 433.

[16] Doughty v. Picott, 105 App. Div. 339, 94 N. Y. Supp. 43. "The fact that he asked in his notice more than he was entitled to does not render the whole notice inoperative, nor deprive him of the appeal which he has in fact taken. In such a case the county court may, upon the

from the trial calendar to the law calendar may properly be made and determined in advance of the trial, or it may be made at the trial term of the county court.[17]

If the justice's judgment from which the appeal for a new trial is taken is void, there is no judgment to support the appeal and it must be dismissed.[18]

§ 2941. Procedure on new trial.

Upon an appeal to obtain a new trial in the county court, "after the expiration of ten days from the time of filing the justice's return, the action is deemed an action at issue in the appellate court, and all the proceedings therein, including the entry, enforcement, and review of the judgment, are the same as if the action had been commenced in the appellate court, except as otherwise specially prescribed in chapter nineteen of the Code."[19]

This Code provision relates to procedure, and includes the

appellant's application, remove the case from the trial calendar to the law calendar, and thereafter treat the case as an appeal taken under section 3046, merely; and in such cases, if necessary, an order may be entered requiring the justice to make an amended return that will conform to the requirements of section 3053." Id.

[17] 3 Wait's Law & Pr. 657.

[18] Gillingham v. Jenkins, 40 Hun, 594; Gould v. Patterson, 87 Hun, 533, 34 N. Y. Supp. 289.

[19] Code Civ. Proc. § 3071. The new trial may be determined though it appears thereon that the justice had no jurisdiction because the accounts proved exceeded $400. Crannell v. Comstock, 12 Hun, 293. This Code provision prescribing the time when issue is deemed to be joined in the appellate court should be construed to relate to the issue only, and in no way to affect the time when the action shall be deemed pending in the county court. The action is no less in the county court after the notice of appeal is served, and before the action is at issue in the county court, than is an action in the supreme court after the summons is served, and before an issue is joined by the service of an answer or demurrer. It follows that an attorney at law for defendant (respondent) may serve an offer of judgment before the expiration of the ten days, and this is so though defendant had not previously appeared in the county court. Cutting v. Jessmer, 101 App. Div. 283, 91 N. Y. Supp. 658.

power of the court to allow amendments to the pleadings so as to permit the trial of issues which were not raised in the court below.[20] If no offer to allow judgment is made, the trial proceeds in the same manner as an action commenced by the service of a summons and brought before the county court in accordance with the ordinary practice in a court of record. A notice of trial cannot be served until the expiration of ten days from the filing of the return. After the notice of trial is served, a note of issue should be filed with the clerk of the county court.

—— **Pleadings and amendment thereof.** The action is tried in the county court on the pleadings used in the justice's court, subject to amendments allowed by the county court.[21] Prior to the amendment in 1865 of section 366 of the old Code, it was held that the issues in the justice's court could not be changed by amendment in the county court on appeal to it for a new trial.[22] After the Code was amended so as to permit the county court to allow amendments, it was held that no material amendment affecting the issues could be allowed, but only such changes of the pleadings as to enable the parties fully and fairly to try such issues.[23] In a later case, an amendment was held proper though it increased the amount demanded to a sum exceeding the justice's jurisdiction.[24] No good reason is apparent why the power to amend should not be as comprehensive as that exercised in actions originally commenced in a court of record, and it is submitted that the authorities sustain the proposition.[25] The complaint cannot be amended so as to change the character of the action from contract to tort.

[20] Gould v. Patterson, 87 Hun, 533, 34 N. Y. Supp. 289.

[21] Section 2944 of the Code provides that "the court must, upon application, allow a pleading to be amended, at any time before the trial, or during the trial, or upon appeal, if substantial justice will be promoted thereby." This provision applies, however, it seems, only to amendments in the justice court.

[22] Savage v. Cock, 17 Abb. Pr. 403.

[23] Reno v. Millspaugh, 14 Hun, 229. New and affirmative defenses, such as payment, set-off, etc., refused. Id.

[24] Jacob v. Watkins, 10 App. Div. 475, 42 N. Y. Supp. 6.

[25] See Gould v. Patterson, 87 Hun, 533, 34 N. Y. Supp. 289; Paddock v. Barnett, 88 Hun, 381, 34 N. Y. Supp. 834; Cramer v. Lovejoy, 41 Hun, 581.

—— **Evidence admissible.** The evidence admissible under the pleadings is the same as would have been admissible in the justice's court. For instance, payment of defendant's counterclaim, subsequent to the appeal, may be shown on the new trial in the county court without any reply, since a reply is not necessary in an action before a justice to authorize a defense to a counterclaim.[27]

—— **Review of questions raised before justice.** Under the old Code, the county court, on an appeal for a new trial, was required to pass on certain questions of law raised in the justice's court "before the trial,"[28] but now the questions raised before the justice are not reviewable in the county court.[29] It follows that an appeal from the judgment of the county court, where a new trial has been had, does not bring up the proceedings in the justice's court.[30]

—— **Dismissal of appeal.** Section 2863 of the Code specifically mentions certain cases of which "a justice of the peace cannot take cognizance." Among these are actions where the title to real property comes in question and where accounts exceeding four hundred dollars are involved. The question has arisen whether, where the record does not show that the question was raised before the justice, the appeal for a new trial must be dismissed where it appears in the trial in the county court that the action is one embraced within this Code section. The rule laid down under the old Code that the case could be dismissed for want of jurisdiction where a question of title is involved in the trial in the county court[31] is obsolete. If the record does not show that the title to the land was disputed in the proceedings before the justice, the appeal cannot be dismissed because of the showing in the county court.[32] So it is

[26] Burch v. Spencer, 15 Hun, 504.

[27] Utter v. Nelligan, 92 Hun, 185, 36 N. Y. Supp. 591.

[28] Stevens v. Benton, 2 Lans. 156; Maxon v. Reed, 8 Hun, 618; Stevens v. Benton, 39 How. Pr. 13.

[29] Pearce v. Nester, 50 Hun, 546, 3 N. Y. Supp. 720; Gould v. Patterson, 87 Hun, 533, 34 N. Y. Supp. 289.

[30] Burton v. Wheeler & Wilson Mfg. Co., 5 Wkly. Dig. 384.

[31] O'Donnell v. Brown, 3 Lans. 474.

[32] Gould v. Patterson, 63 Hun, 575, 18 N. Y. Supp. 332.

held that the action should not be dismissed though it appears on the new trial that the justice had no jurisdiction because the amounts proved exceeded four hundred dollars.[33] These decisions are not in conflict with the well established rule that where the judgment is void there is no judgment to support the appeal and the appeal will be dismissed.[34] A voluntary appearance in the county court waives objections to the jurisdiction of the justice over a foreign corporation.[35]

—— **Reference.** The county court may order a reference to hear and determine the issues, on the written consent of the parties,[36] or in a proper case, on the motion of one party against the objection of the other;[37] and the procedure after the referee files his report is the same as if the action was originally brought in a court of record.[38]

—— **New trial.** A new trial may be moved for, after the trial in the county court, the same as if the action was originally commenced in the county court.

[33] Crannell v. Comstock, 12 Hun, 293. The reason is that the question depends on the evidence given on the trial in the court below and as the evidence is not returned the question cannot be passed on by the county court.

[34] Gillingham v. Jenkins, 40 Hun, 594; Gould v. Patterson, 87 Hun, 533, 34 N. Y. Supp. 289.

[35] Burton v. Wheeler & Wilson Mfg. Co., 5 Wkly. Dig. 384.

[36] Hyland v. Loomis, 48 Barb. 126.

[37] Coy v. Rowland, 40 How. Pr. 385

[38] Cook v. Darrow, 22 Hun, 306.

CHAPTER VII.

COSTS.

Right to where appeal is not for a new trial, § 2942.
Amount where new trial not sought, § 2943.
Right to after new trial in county court, § 2944.
—— As affected by offer of judgment before the return.
—— As affected by offer of judgment after action is at issue.
Amount where new trial had in county court, § 2945.
Disbursements, § 2946.

§ 2942. Right to where appeal is not for a new trial.

If a new trial is not asked, the award of costs is regulated by section 3066 of the Code, as follows:

"1. If the appeal is dismissed because neither party brings it to a hearing, * * * costs shall not be awarded to either party.

"2. If the judgment is reversed for an error in fact, not affecting the merits, or if a new trial, is directed before the same or another justice, the costs of the appeal are in the discretion of the appellate court.[7]

"3. If the judgment is affirmed, costs must be awarded to the respondent.

[1] Error in holding that plaintiff's proceedings are stayed for nonpayment of costs is not an "error in fact" so as to make the costs discretionary. The words "error in fact" have no reference to an erroneous ruling, or finding on the evidence, by the justice or a jury, but refer to some occurrence which affects the validity of the trial, such as service of process by one not authorized, infancy of a party for whom no guardian ad litem has been appointed, relationship of the justice, misconduct of the jury, and the like. Smith v. Cayuga Lake Cement Co., 105 App. Div. 307, 93 N. Y. Supp. 959. That discretion as to costs when reversal is for error in fact is not reviewable, see Monroe v. White, 25 App. Div. 292, 49 N. Y. Supp. 517. If judgment is reversed because the judgment is contrary to, or against the weight of evidence, and a new trial is ordered, the costs are discretionary. Code Civ. Proc. § 3063.

"4. If the judgment is reversed, costs must be awarded to the appellant.[2]

"5. If the judgment is affirmed only in part, the costs, or such a part thereof, as to the appellate court seems just, not exceeding ten dollars, besides disbursements, may be awarded to either party."[3]

§ 2943. Amount where new trial not sought.

Costs, when awarded, must be as follows, besides disbursements:

To the appellant, upon reversal, thirty dollars.

To the respondent, upon affirmance, twenty-five dollars.[4]

§ 2944. Right to after new trial in county court.

The party in whose favor the verdict, report, or decision in the county court is given, is entitled to recover his costs on the appeal, provided neither party has made an offer to compromise.[5] In the absence of such an offer by either party, the party successful in the county court is entitled to costs without regard to the amount of his judgment.[6] Before 1885 the re-

[2] If the judgment is absolutely affirmed or reversed for error of law, the appellate court cannot refuse costs to the successful party. Wood v. Brown, 6 Daly, 428. See, also, Harding v. Ellston, 19 Civ. Proc. R. (Browne) 252, 13 N. Y. Supp. 549; Jacks v. Darrin, 1 Abb. Pr. 232. Rule applies to reversal of order in summary proceedings. Harrison v. Swart, 34 Hun, 259.

[3] Where judgment is modified, costs are discretionary and not reviewable by the appellate court. Compton v. Long Island R. Co., 1 State Rep. 554.

[4] Code Civ. Proc. § 3067. Term fees are not allowable. Horning v. Smith, 19 Civ. Proc. R. (Browne) 142, 11 N. Y. Supp. 790.

[5] Code Civ. Proc. § 3070. In such a case, costs need not be expressly awarded. Wheeler v. Mowers, 16 Misc. 331, 39 N. Y. Supp. 731.

[6] Pierano v. Merritt, 148 N. Y. 289. If no offer is made after plaintiff's recovery in justice's court, and plaintiff does not recover in the county court, defendant is entitled to costs though he recovers nothing on his counterclaim. Clark v. Malzacher, 20 App. Div. 301, 46 N. Y. Supp. 1081. It has been held, however, that where no offer is made and plaintiff recovers less than fifty dollars he is not entitled to costs. Rhodes v. Carr, 88 Hun, 219, 34 N. Y. Supp. 722.

covery was required to be more favorable to the appellant "by the sum of ten dollars" than the recovery in the justice's court to entitle the appellant to costs where no offer of judgment was made.[7]

—— **As affected by offer of judgment before the return.** If the appeal is from a judgment for a sum of money only, either party,[8] may, within fifteen days after service of the notice of appeal, serve on the adverse party, or upon his attorney,[9] a written offer[10] to allow judgment to be rendered in the county court, in favor of either party, for a specified sum. If the offer is not accepted it cannot be proved on the trial. If the party, within ten days after the service of the offer on him, serves on the party making the same, or on his attorney, written notice that he accepts the offer, he must file it, with an affidavit of service of the notice of acceptance, with the clerk of the appellate court, who thereupon must enter judgment accordingly.[11] Where an offer is made, the party refusing to accept it is liable for costs of the appeal unless the recovery[12] shall be more favorable to him than the sum offered.[13]

[7] When judgment is more favorable, see Vanderwerken v. Brown, 38 Hun, 234; Vogel v. Schlueter, 73 Hun, 595, 26 N. Y. Supp. 435.

[8] Before the amendment of 1885, the offer could be made only by the respondent.

[9] If there is an attorney, the service should be on him rather than on the party. Purvis v. Gray, 39 How. Pr. 1. The attorney in the appellate court is the attorney to be served. McLear v. Reynolds, 76 App. Div. 267, 78 N. Y. Supp. 457.

[10] Offer need not be subscribed by the party in person. Sherman v. Shisler, 6 Misc. 203, 27 N. Y. Supp. 215. It may be subscribed by an attorney at law though the action is not at issue in the county court because the ten days from the filing of the justice's return have not elapsed. Cutting v. Jessmer, 101 App. Div. 283, 91 N. Y. Supp. 658. Where offer is signed by the attorney, he need not annex thereto his affidavit showing his authority to make the offer. Section 740 of the Code does not apply. Id.

[11] Code Civ. Proc. § 3070.

[12] The word "recovery" means a recovery in dollars and cents and not a mere successful defense to plaintiff's claim. Brazee v. Town of Hornby, 27 Misc. 129, 58 N. Y. Supp. 387.

[13] Code Civ. Proc. § 3070.

Two important questions have arisen in construing this Code section. The first is whether, where the judgment is more favorable to the party rejecting the offer than the offer, he is entitled to costs where the recovery is less than fifty dollars and the party recovering has made no offer of judgment. In other words, do sections 3228 and 3229 of the Code which apply to costs generally in courts of record and which prohibit an award of costs to plaintiff in an action for the recovery of money only unless he recovers fifty dollars or more, and which give defendant costs in such cases where plaintiff is not entitled thereto, apply to these appeals? The court of appeals has held that a plaintiff is not entitled to costs in the county court where he recovers less than fifty dollars, though the judgment recovered by him is more favorable than defendant's offer, unless plaintiff himself has made an offer to take judgment for a specified sum less than his recovery in the county court, which offer has been refused.[14] This ruling is based on the ground that section 3070 of the Code, which regulates the offer of judgment, does not make any provision as to who shall be entitled to costs where an offer of judgment is made by one party and not accepted by the other and the recovery is more favorable to the party refusing to accept the offer than the sum offered. But supposing section 3070 does not apply because of such facts, then the question arises as to whether sections 3228 and 3229 apply and authorize the taxation of costs in favor of plaintiff (the party refusing the offer) where he recovers a more favorable judgment for fifty dollars or more, or in favor of defendant where he refuses the offer and plaintiff recovers less than the offer and less than fifty dollars. An early case held that sections 3228 and 3229 did not apply and that where plaintiff makes an offer which is not accepted, and he recovers less than the offer, and less than fifty dollars, the defendant is not entitled to costs, because section 3229 of the Code does not apply.[15] The reasoning of this case is convincing and it is submitted that the decision ought to have been followed, but the later cases

[14] McKuskie v. Hendrickson, 128 N. Y. 555.

[15] Zoller v. Smith, 45 Hun, 319. And see Watson v. Benz, 57 Hun, 398, 10 N. Y. Supp. 799.

have expressly held the contrary.[16] Thus, it is held that where the successful plaintiff makes an offer which is refused, but defendant makes no offer, and defendant wholly succeeds in the county court, defendant is entitled to costs under section 3229 of the Code because of plaintiff's failure to recover fifty dollars or more.[17] So it is held that where plaintiff refuses defendant's offer and recovers a more favorable judgment in excess of fifty dollars, he is entitled to costs under section 3228 of the Code.[18]

Where the offer to allow judgment for a specified sum, is accepted, the party accepting cannot tax fifteen dollars as costs before notice of trial but only his disbursements, including the costs of the court below, the return fee, and the costs for serving the notice of appeal.[19] The offer, if accepted, is not inclusive of the costs paid to perfect the appeal.[20]

The second question which is often difficult of solution is involved in the determination of when a recovery is "more favorable to him (the party refusing the offer) than the sum offered."[21] No general rule can be laid down as to what is a more favorable judgment but each case must be decided to a large extent according to its own circumstances. The offer must be determined by the condition of the pleadings at the time it was made, and hence if a counterclaim be subsequently pleaded and allowed, its extinguishment is to be deemed beneficial to the plaintiff to that extent.[22] Where the damages are liquidated, interest from the date of the offer to the date of the

[16] Fowler v. Dearing, 6 App. Div. 221, 39 N. Y. Supp. 1034; Brazee v. Town of Hornby, 27 Misc. 129, 58 N. Y. Supp. 387, followed in Rose v. Wells, 92 App. Div. 75, 86 N. Y. Supp. 889. See, also, Snyder v. Hughes, 27 Hun, 373; Quick v. Wixon, 27 Hun, 592; Munson v. Curtis, 43 Hun, 214; Rhodes v. Carr, 88 Hun, 219, 34 N. Y. Supp. 722.

[17] Brazee v. Town of Hornby, 27 Misc. 129, 58 N. Y. Supp. 387.

[18] Fowler v. Dearing, 6 App. Div. 221, 39 N. Y. Supp. 1034.

[19] Smith v. Dederick, 18 Misc. 507, 42 N. Y. Supp. 1119.

[20] Hollenback v. Knapp, 42 Hun, 207, followed in Lauffer v. Bast, 34 Misc. 408, 69 N. Y. Supp. 874.

[21] What is a more favorable judgment where offer is made in action commenced in court of record, see vol. 2, pp. 1998–2001.

[22] Adolph v. De Ceu, 45 Hun, 130, following Tompkins v. Ives, 36 N. Y. 75.

recovery, included in the verdict, report, or decision should be taken into consideration in determining whether the recovery is more favorable than the offer;[23] but if the damages are unliquidated, the recovery should be compared with the offer, without adding interest to the offer and without discounting the amount of the recovery as shown in the verdict, report, or decision.[24] The record is prima facie evidence on the question whether the judgment is more favorable than the offer. If there are special circumstances outside the record affecting the question they should be made to appear by affidavits.[25] The costs which an acceptance of the offer would carry on the entry of judgment are to be added to the offer in comparing the recovery with the offer.[26]

—— **As affected by offer of judgment after action is at issue.** The question of costs may also be affected by an offer to allow judgment which is served before the trial but after the action is deemed at issue in the county court, i. e., after ten days from the filing of the justice's return. Such offer may be served on the adverse party by either party "to allow judgment to be taken against him, for a sum, or property, or to the effect, therein specified, with or without costs. If there are two or more defendants, and the action can be severed, a like offer may be

[23] Pike v. Johnson, 47 N. Y. 1, followed in Rose v. Wells, 92 App. Div. 75, 86 N. Y. Supp. 889. The amount of such interest, and that it was allowed, may be shown by affidavit. "The reason for considering interest in determining whether a verdict, report or decision is more favorable to a party than an offer of judgment, is not that the party accepting an offer of judgment would have interest on the judgment from the time of its entry or the use of the sum offered if paid or collected, but interest is considered because the recovery as shown by the verdict, report or decision actually includes interest that has accrued between the service of the offer and the rendition of the verdict, or the filing of the report or decision. * * * Interest should only be computed for the purpose of comparison in cases where it is actually included in the recovery." Rose v. Wells, 92 App. Div. 75, 86 N. Y. Supp. 889.

[24] Rose v. Wells, 92 App. Div. 75, 86 N. Y. Supp. 889. See, also, Smith v. May, 32 How. Pr. 222.

[25] Earl v. Collins, 23 Wkly. Dig. 108.

[26] Baldwin v. Brown, 37 How. Pr. 385.

made by one or more defendants, against whom a separate judgment may be taken; and, if it is accepted, the action becomes severed and may proceed against the other defendants as if it had been originally commenced against them only. If the party receiving the offer, within ten days thereafter, serves upon the adverse party notice that he accepts it, he may file it with proof of acceptance, and thereupon the clerk must enter judgment accordingly. If the offer is not thus accepted, it cannot be proved upon the trial, and if the party to whom it was made fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer but must pay costs from that time." [27]

Inasmuch as this Code provision applies only to cases where the action is deemed at issue in the county court, it does not apply to an offer served in less than twenty days after the service of the notice of appeal, since the action is not deemed at issue until the expiration of said twenty days.[28]

§ 2945. Amount where new trial had in county court.

Costs, where awarded,[29] must be as follows, besides disbursements:

"For all proceedings before notice of trial, fifteen dollars.

"For all subsequent proceedings before trial, ten dollars.

"For the trial of an issue of law, fifteen dollars.

"For the trial of an issue of fact, twenty dollars.

"For the argument of a motion for a new trial on a case, fifteen dollars.

"For each term, not more than five, at which the appeal is regularly on the calendar, excluding the term at which it is tried, or otherwise finally disposed of, ten dollars." [30]

[27] Code Civ. Proc. § 3072.

[28] Watson v. Benz, 58 Hun, 607, 12 N. Y. Supp. 51.

[29] The words "when awarded" do not confine the right to costs to cases where costs are expressly awarded, since costs follow as of course where neither party makes an offer of judgment. Wheeler v. Mowers, 16 Misc. 331, 39 N. Y. Supp. 731.

[30] Code Civ. Proc. § 3073.

No costs are taxable, where the county court awards a new trial, for services after granting and before the new trial, since no provision is made therefor in this Code section.[31]

§ 2946. Disbursements.

Where costs are awarded to the appellant, he may include, in the disbursements upon the appeal, the costs and fee paid to the justice upon taking the appeal; and, where the judgment rendered by the justice was against the appellant, he may also include, in those disbursements, the costs of the action before the justice, which he would have been entitled to recover, if the judgment had been in his favor.[32]

Costs paid to the justice to perfect an appeal are not, on reversal, recoverable from the justice or his clerk, but can be obtained only by including them in the disbursements, as provided for in this Code section.[33] So such costs are not recoverable by action from the respondents to whom they have been paid.[34]

[31] Wheeler v. Mowers, 16 Misc. 331, 39 N. Y. Supp. 731.

[32] Code Civ. Proc. § 3060. This Code rules applies to appeals where a new trial is demanded as well as to appeals where a new trial is not demanded.

[33] Sherwood v. Travelers' Ins. Co., 65 How. Pr. 193.

[34] Bradley Salt Co. v. Meinhold, 23 Misc. 468, 52 N. Y. Supp. 679.

APPENDIX.

Scope of appendix and how to use it. The following appendix is intended merely as a supplement to the first three volumes of this work so as to bring them down to date with reference to the Code and other statutory amendments and cases decided since the publication of the respective volumes. It includes all the cases reported down to 183 N. Y., 106 App. Div., 47 Misc., and 95 N. Y. Supp., together with the statutory changes in the practice up to and including the legislative session of 1904–1905.

A word as to how to use the appendix. After looking up a proposition of law in any one of the first three volumes, turn to the appendix to ascertain if there has been any statutory change in the law, or reiteration, modification, or reversal in a late case or in a higher court. Another reason for consulting the index is that errors, clerical or otherwise, so far as called to the attention of the author, have been corrected therein. The black letter number at the beginning of the paragraph in the appendix refers to the page in Vol. 1, 2, or 3 to which the appendix paragraph relates. The second light faced number indicates the particular note or section to which the given proposition is referable. Thus, **1942**, n. 81, means that the proposition on page 1942, note 81, is reiterated, modified, added to, or reversed by the case cited in the appendix. If the proposition is merely reiterated, only the title of the case is given. If the appendix proposition cannot be tacked to any note number and there are two or more sections on the page referred to, the reference will be as follows: **1510**, § 1149, meaning page 1510, section 1149.

This appendix is not intended for use independent of the original text but only in connection with it and after reference to the original text. Always consult the appendix last and not first.

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12. § 5. Many of the late cases as to what are and what are not special proceedings have been collected in this volume in the text relating to appellate practice on appeals from courts of record (p. 3614), and such decisions will not be again set forth in this connection.

17. An application to compel a purchaser at a judicial sale to take title and that of a purchaser to be relieved from his bid are special proceedings. Parish v. Parish, 175 N. Y. 181. Proceedings under section 915 of the Code to punish a witness for contempt in failing to give testimony for use in an action in another state are special proceedings. Matter of Strong, 177 N. Y. 400.

21. Action to recover royalty is action at law. Henderson v. Dougherty, 95 App. Div. 346, 351, 88 N. Y. Supp. 665.

21, n. 74. Schulsinger v. Blau, 84 App. Div. 390, 82 N. Y. Supp. 686.

21, n. 75. Followed in Zeiser v. Cohn, 44 Misc. 462, 471, 90 N. Y. Supp. 66.

28. An action by a tenant against his landlord to recover damages for failure to make repairs as provided for by contract, whereby the tenant suffered a personal injury, is based on contract. Spero v. Levy, 43 Misc. 24, 86 N. Y. Supp. 869. Where no objection is made, and the claim is treated by both parties as ex contractu, an appellate court will not interfere. La Grange v. Merritt, 96 App. Div. 61, 89 N. Y. Supp. 32. If plaintiff elects to sue in tort he cannot recover in assumpsit. Bermel v. Harnischfeger, 97 App. Div. 402, 89 N. Y. Supp. 1029.

29, n. 98. Price v. Parker, 44 Misc. 582, 90 N. Y. Supp. 98.

30, n. 107. Jones v. Leopold, 95 App. Div. 404, 88 N. Y. Supp. 568. See, also, Wood v. E. & H. T. Anthony & Co., 79 App. Div. 111, 79 N. Y. Supp. 829.

31, n. 109. Such an action is based on contract. Citizens' Nat. Bank v. Wetsel, 96 App. Div. 85, 88 N. Y. Supp. 1079.

34, n. 130. Heasty v. Lambert, 98 App. Div. 177, 90 N. Y. Supp. 595. The submission will be dismissed where all necessary parties are not brought in. Schreyer v. Arendt, 83 App. Div. 335, 82 N. Y. Supp. 122. Where a controversy as to the person entitled to the proceeds of a benefit certificate in a mutual benefit society was submitted, and the determination thereof

depended on a construction of important provisions of the society's charter, the society was a necessary party to the submission. Davin v. Davin, 105 App. Div. 580, 94 N. Y. Supp. 281.

34, n. 134. Failure of the proposed submission to contain an agreement as to the facts which are admitted is not cured by the fact that opposite the title there is a memorandum to the effect that it is a case agreed on in a controversy submitted without action, pursuant to the Code of Civil Procedure. Begen v. Curtis, 81 App. Div. 91, 80 N. Y. Supp. 929.

37. It seems that there can be no judgment by default on the failure of one of the litigants to appear on the trial. Heasty v. Lambert, 98 App. Div. 177, 90 N. Y. Supp. 595.

38, n. 163. Davin v. Davin, 105 App. Div. 580, 94 N. Y. Supp. 281.

40, § 17. The former remedy to recover damages for personal injuries resulting in death is cumulative with the remedy provided for by the Employer's Liability Act. Monigan v. Erie R. Co., 99 App. Div. 603, 91 N. Y. Supp. 657; Mulligan v. Erie R. Co., 99 App. Div. 499, 91 N. Y. Supp. 60.

42. That action to set aside assignment for benefit of creditors is not an election to take in hostility to the assignment, see Matter of Garver, 176 N. Y. 386.

43, § 24. An action on contract on the theory that the contract created a partnership is inconsistent with an action on the theory that the same contract was one of employment. Sacker v. Marcus, 43 Misc. 8, 86 N. Y. Supp. 83. There is no election of remedies where plaintiff sets out a cause of action at common law for negligence resulting in personal injuries, and afterwards seeks to amend so as to bring the case within the Employer's Liability Act. Mulligan v. Erie R. Co., 99 App. Div. 499, 91 N. Y. Supp. 60; Monigan v. Erie R. Co., 99 App. Div. 603, 91 N. Y. Supp. 657.

43, n. 194. Citizens' Nat. Bank v. Wetsel, 96 App. Div. 85, 88 N. Y. Supp. 1079.

44, § 25. The statement in an affidavit, in opposition to a motion for a change of venue, that the action is in tort, does not constitute a binding election, where the statement was merely

incidental and had no effect on the decision of the court. Price v. Parker, 44 Misc. 582, 90 N. Y. Supp. 98.

45, n. 211. An election of remedies is determined by the commencement of an action and not by the result of it. Matter of Garver, 176 N. Y. 386, 394.

46, § 27. A pending action is a bar though the complaint therein is demurrable, where the right to demur has been waived. Romaine v. New York, N. H. & H. R. R. Co., 87 App. Div. 569, 84 N. Y. Supp. 491. The pendency of another action may be established by reading in evidence a copy of the complaint served on the defendant's attorney. Id. See Place v. Rogers, 101 App. Div. 193, 91 N. Y. Supp. 912, where it was held proper to refuse to stay the sale under an interlocutory judgment in partition until the final determination of a pending ejectment action.

46, n. 219. Cassidy v. Arnold, 100 App. Div. 412, 91 N. Y. Supp. 570.

46, n. 222. Hirsh v. Manhattan R. Co., 84 App. Div. 374, 377, 378, 82 N. Y. Supp. 754.

47, n. 223. Hart v. Hart, 86 App. Div. 236, 83 N. Y. Supp. 897.

47, n. 226. Hirsh v. Manhattan R. Co., 84 App. Div. 374, 82 N. Y. Supp. 754.

50, n. 247. Sammons v. Parkhurst, 46 Misc. 128, 93 N. Y. Supp. 1063. An action by the stockholders of a corporation on behalf of themselves and all other stockholders against the corporation and its directors for an accounting for the fraud of the directors, should not be dismissed because there had been commenced at the same time a statutory action for the same relief by a director, though the parties plaintiff were closely related and their interests in the subject-matter were similar, and though the director who brought the statutory action was joined as a plaintiff in the stockholders' action. Loewenstein v. Diamond Soda Water Mfg. Co., 94 App. Div. 383, 88 N. Y. Supp. 313.

50, n. 251. A pending action is not a bar where it does not necessarily result in a determination of all the issues presented by a second action. Jordan v. Underhill, 91 App. Div. 124, 128, 86 N. Y. Supp. 620.

51, n. 256. Jordan v. Underhill, 91 App. Div. 124, 128, 86 N. Y. Supp. 620; Jones v. Leopold, 95 App. Div. 404, 88 N. Y. Supp. 568.

52, § 41. Defendant, by not raising any question by motion or objection which indicates any reliance on the plea of another action pending, and by basing its motion for a dismissal on a distinct ground which did not involve such question, is deemed to have waived the defense, and cannot first urge the plea in an appellate court. Hirsh v. Manhattan R. Co., 84 App. Div. 374, 82 N. Y. Supp. 754.

54, § 44. An action to recover on a quantum meruit for labor and materials furnished is not barred by judgment in an action to foreclose a mechanic's lien where it was expressly adjudged in the first action that there could be no recovery for the work and materials because the contract had not been performed or substantially performed. Maeder v. Wexler, 43 Misc. 16, 87 N. Y. Supp. 400. Where the buyer repudiates a contract for delivery of property in instalments, because of the failure to deliver an instalment, the buyer cannot split up his cause of action for damages by suing at different times for the nondelivery of past instalments and remaining instalments. Pakas v. Hollingshead, 42 Misc. 287, 86 N. Y. Supp. 560.

54, n. 274. Maeder v. Wexler, 98 App. Div. 68, 90 N. Y. Supp. 598.

55, § 44. But where part of a demand has been assigned, a recovery by the assignor of the balance of the demand does not bar an action by his assignee to recover the amount assigned to him. Goldshear v. Barron, 42 Misc. 198, 85 N. Y. Supp. 395.

58, n. 300. Zeiser v. Cohn, 44 Misc. 462, 90 N. Y. Supp. 66; Hall v. Gilman, 77 App. Div. 458, 463, 79 N. Y. Supp. 303. A complaint which charges a conspiracy to injure the plaintiff's good name, and which sets forth the acts done by each defendant, states but a single cause of action. Green v. Davies, 83 App. Div. 216, 82 N. Y. Supp. 54. Action by stockholders to compel officers of corporation to account as stating but one cause of action, see Ward v. Smith, 95 App. Div. 432, 88 N. Y. Supp. 700. Complaint held to state but one cause of action against a corporation for rescission of a subscription. Mack v. Latta, 83 App. Div. 242, 252, 82 N. Y. Supp. 130.

58, n. 301. Definition followed in Rogers v. Wheeler, 89 App. Div. 435, 85 N. Y. Supp. 981, which held that action for accounting against individuals and representatives of an estate involved but one cause of action.

59. A complaint charging a conspiracy and illegal combination, pursuant to which slanders were uttered and libels published, and plaintiff was illegally arrested and maliciously prosecuted, states but a single cause of action. Rourke v. Elk Drug Co., 75 App. Div. 145, 77 N. Y. Supp. 373; contra, Green v. Davies, 182 N. Y. 499, reversing on this point 100 App. Div. 359, 91 N. Y. Supp. 470. In an action by a stockholder of a corporation, a complaint alleging that one of defendants, by collusion with the directors, had fraudulently acquired stocks belonging to the corporation, and seeking to obtain a cancellation of the contract under which the securities were obtained, and the delivery of them to the corporation, does not state more than one cause of action. O'Connor v. Virginia Pass. & Power Co., 45 Misc. 228, 92 N. Y. Supp. 161.

59, n. 302. See, also, Whitingham v. Darrin, 45 Misc. 478, 92 N. Y. Supp. 752.

59, n. 309. Where the facts alleged show one primary right of the plaintiff, and one wrong done by the defendant which violates that right, the complaint states but a single cause of action, no matter how many forms and kinds of relief the plaintiff may be entitled to. City of N. Y. v. Knickerbocker Trust Co., 104 App. Div. 223, 93 N. Y. Supp. 937.

60. There is only one cause of action though several persons sue a railroad company for setting fire to a property where the plaintiffs have all acquired an interest in the property and there is only one negligent act. Jacobs v. New York Cent. & H. R. R. Co., 107 App. Div. 134, 94 N. Y. Supp. 954.

62, n. 317. This case is overruled by Reilly v. Sicilian Asphalt Pav. Co., 170 N. Y. 40, in so far as it holds that a complaint setting up an injury to the person and an injury to property, resulting from the same tortious act, sets up but one cause of action.

63. n. 331. A common-law and a statutory cause of action for damages caused by a false report by an officer of a corpo-

ration may be joined, since both are causes of action for personal injuries. Hutchinson v. Young, 93 App. Div. 407, 87 N. Y. Supp. 678.

63, n. 334. Green v. Davies, 100 App. Div. 359, 91 N. Y. Supp. 470, reversed on other grounds in 182 N. Y. 499.

64, n. 344. Causes of action against several members of the board of supervisors to recover claims illegally audited by the board may be joined in a taxpayer's action, since both are for injuries to personal property. Wallace v. Jones, 182 N. Y. 37, which reverses 92 App. Div. 613, 86 N. Y. Supp. 1149.

64, subd. 3. An action for slander may be maintained against several persons. Green v. Davies, 182 N. Y. 499.

66. A cause of action for the wrong done in putting on the market for sale a gun constructed of such defective material and so carelessly that it was unsafe for use and a danger to the community cannot be joined with a cause of action for breach of warranty owing to the explosion of a gun sold to plaintiff. Reed v. Livermore, 101 App. Div. 254, 91 N. Y. Supp. 986.

68. Joinder of causes of action in a complaint in an action for the reformation of an agreement and for an accounting, against an individual and a corporation, held proper on the ground that the causes of action arose out of the same transaction. Woolf v. Barnes, 46 Misc. 169, 93 N. Y. Supp. 219.

68, n. 361. See, also, Rogers v. Wheeler, 89 App. Div. 435, 85 N. Y. Supp. 981.

68, n. 363. Causes of action for injuries to person and to property from a single negligent act may be joined. McInerney v. Main, 82 App. Div. 543, 81 N. Y. Supp. 539.

69. A cause of action for unlawfully taking from plaintiff's possession a pair of horses and a buggy and converting them to defendant's own use cannot be joined with a cause of action for a subsequent assault and battery on plaintiff while he was engaged in an endeavor to regain possession thereof. Campbell v. Hallihan, 45 Misc. 325, 90 N. Y. Supp. 432. In a taxpayer's suit to recover from the board of supervisors the amount of certain bills claimed to have been illegally and collusively audited by them, causes of action relating to separate bills audited on different days are properly joined where the

auditing of all of them is part of the same scheme. Wallace v. Jones, 182 N. Y. 37.

71, n. 377. McInerney v. Main, 82 App. Div. 543, 547, 81 N. Y. Supp. 539, per Hirschberg, J.

71, n. 378. A cause of action under section 31 of the Stock Corporation Law to recover damages for acts done in reliance on a false report of an officer of a corporation is not inconsistent with a common-law cause of action based on the same facts and asking for identical relief. Hutchinson v. Young, 93 App. Div. 407, 87 N. Y. Supp. 678. Cause of action for breach of contract is inconsistent with cause of action for rescission of the same contract on the ground of fraud. Lomb v. Richard, 45 Misc. 129, 91 N. Y. Supp. 881. See, also, vol. 1, p. 1085.

72, n. 387. Case v. New York Mut. Sav. & Loan Ass'n, 88 App. Div. 538, 85 N. Y. Supp. 104; Warner v. James, 88 App. Div. 567, 85 N. Y. Supp. 153. Where a certain amount of a life insurance policy is payable to the widow and a certain other part is payable to the eldest child, the two cannot join as plaintiffs in an action against the company. Conard v. Southern Tier Masonic Relief Ass'n, 104 App. Div. 611, 93 N. Y. Supp. 626.

73, n. 388. Rogers v. Wheeler, 89 App. Div. 435, 442, 85 N. Y. Supp. 981; Hall v. Gilman, 77 App. Div. 458, 463, 79 N. Y. Supp. 303. Where the negligent acts of two or more persons contribute to the infliction of personal injuries on another, they may sue together in one action as joint tort feasors. Lynch v. Elektron Mfg. Co., 94 App. Div. 408, 88 N. Y. Supp. 70.

74. A riparian proprietor may sue, in one action, all the upper riparian owners who contribute to the deposit of refuse and filth in the stream, though they act independently of each other. Warren v. Parkhurst, 105 App. Div. 239, 93 N. Y. Supp. 1009.

74, n. 394. See, also, Groh v. Flammer, 100 App. Div. 305, 91 N. Y. Supp. 423.

75, n. 402. A cause of action by a stockholder against the president of the corporation for breach of contract, by which plaintiff was to hold the office of president, cannot be joined with a cause of action for wrongful appropriation of corporate

funds. Stoddard v. Bell & Co., 100 App. Div. 389, 91 N. Y. Supp. 477.

75, n. 403. Rogers v. Wheeler, 89 App. Div. 435, 85 N. Y. Supp. 981.

82, n. 16. Friedman v. Phillips, 84 App. Div. 179, 82 N. Y. Supp. 96; Turner v. Cedar, 91 N. Y. Supp. 758.

83, § 72. Demand on third persons, to support replevin, is insufficient where they have neither the custody nor control of the property. Heinrich v. Van Wrinckler, 80 App. Div. 250, 80 N. Y. Supp. 226. If a creditor notifies his debtor that he will appear for payment on a certain day, and the creditor calls on that day for the sole purpose of receiving his due, and this is known to the debtor, there is a sufficient demand. Schlimbach v. McLean, 83 App. Div. 157, 82 N. Y. Supp. 516.

84, n. 31. That a substantial compliance with the statute is sufficient, see Williams v. Village of Port Chester, 97 App. Div. 85, 89 N. Y. Supp. 671.

84, n. 33. Many cases have been decided under this statute since its enactment. It is now well settled that notice is not a condition precedent where the complaint does not charge any liability based on the provisions of the statute. Schermerhorn v. Glens Falls Portland Cement Co., 94 App. Div. 600, 88 N. Y. Supp. 407; Gmaehle v. Rosenberg, 178 N. Y. 147; Rosin v. Lidgerwood Mfg. Co., 89 App. Div. 245, 86 N. Y. Supp. 49. But where the action is statutory, the giving of the notice is a condition precedent to the bringing of the action. Grasso v. Holbrook, Cabot & Daly Contracting Co., 102 App. Div. 49, 92 N. Y. Supp. 101. A typewritten notice is sufficient. Hunt v. Dexter Sulphite Pulp & Paper Co., 100 App. Div. 119, 91 N. Y. Supp. 279. Service of the notice after sixty days after the appointment of the administratrix, though within one hundred and twenty days after the accident, is held sufficient in Hoehn v. Lautz, 94 App. Div. 14, 87 N. Y. Supp. 921, but the contrary is held in Randall v. Holbrook, Cabot & Daly Contracting Co., 95 App. Div. 336, 88 N. Y. Supp. 681. Necessity of pleading service of notice, see Gmaehle v. Rosenberg, 80 App. Div. 541, 80 N. Y. Supp. 705; 87 App. Div. 631, 84 N. Y. Supp. 1127, reversed in 178 N. Y. 147; Williams v. Roblin, 94 App. Div. 177, 87 N. W. Supp. 1006.

85, § 77. The general rule, in the absence of statute, is that an action can be brought on a bond, by one not named as obligee therein, only by leave of court. Alexander v. Union Surety & Guaranty Co., 89 App. Div. 3, 85 N. Y. Supp. 282.

87, n. 45. Who are "public officers," see Code Civ. Proc. § 1890. It is doubtful whether the trustee of a bankrupt's estate is a "public officer." Alexander v. Union Surety & Guaranty Co., 89 App. Div. 3, 85 N. Y. Supp. 282.

88. Guardian ad litem cannot be appointed to sue in behalf of an incompetent, but action must be brought by his committee. Rankert v. Rankert, 105 App. Div. 37, 93 N. Y. Supp. 399.

88, n. 51. But suing without leave does not affect the jurisdiction of the court. Pruyn v. Black, 105 App. Div. 302, 93 N. Y. Supp. 995.

89. An infant, prior to the appointment of a committee for him as an insane person, may sue by guardian ad litem. Callahan v. New York Cent. & H. R. R. Co., 99 App. Div. 56, 90 N. Y. Supp. 657. Where, after a guardian ad litem has been appointed for an infant, he is afterwards adjudged insane and a committee appointed, such committee may be substituted as plaintiff in place of the infant, by his guardian; and it is not necessary to provide that the appointment of the committee for the purposes of the action be made nunc pro tunc as of the time of the commencement of this action, or allow the plaintiff generally to amend his complaint. Id.

89, n. 63. The guardian must be appointed by the court in which the action has been or is to be brought, and with reference to the particular litigation. The supreme court cannot appoint a guardian ad litem for an infant plaintiff in the city court of New York. Goodfriend v. Robins, 92 N. Y. Supp. 240.

90. Proper practice requires a verification of the petition though there is no statutory necessity. Baumeister v. Demuth, 84 App. Div. 394, 398, 82 N. Y. Supp. 831. Defects in the petition are amendable nunc pro tunc. Id.

93, n. 92. Goodfriend v. Robins, 92 N. Y. Supp. 240.

102, n. 17. Section 1351 of the Greater New York Charter expressly provides that the municipal court created thereby to take the place of the district courts of New York city and the justices' courts of Brooklyn "shall not be a court of record."

104. Construction of New Mexico Code making Sunday the time between sunrise and sunset, and forbidding service of process on Sunday, see Harrison v. Wallis, 44 Misc. 492, 498, 90 N. Y. Supp. 44.

108, n. 56. Smith v. Warringer, 41 Misc. 94, 83 N. Y. Supp. 655.

113, n. 75. The Code requires written consent. Oral consent in open court is insufficient. Armstrong v. Loveland, 99 App. Div. 28, 90 N. Y. Supp. 711.

114. A judicial opinion is binding only so far as it is relevant and when it wanders from the point at issue it no longer has force as an official utterance. Crane v. Bennett, 177 N. Y. 106, 112, and cases cited.

114, n. 85. Obiter dicta will not control subsequent decisions. People ex rel. McLaughlin v. Police Com'rs of Yonkers, 174 N. Y. 450, 466.

115, n. 90. So held though a determination of the question decided was not necessary. Ryan v. City of N. Y., 78 App. Div. 134, 79 N. Y. Supp. 599.

123, n. 135. That consent before an action or proceeding is commenced is not a waiver, see Matter of Graham, 39 Misc. 226, 79 N. Y. Supp. 573.

126. A state court is without jurisdiction to enjoin proceedings before a federal court in another state. Johnstown Min. Co. v. Morse, 44 Misc. 504, 90 N. Y. Supp. 107.

128. A court of equity may enjoin a party to an action pending in this state from prosecuting an action subsequently commenced in another state. Locomobile Co. of America v. American Bridge Co., 80 App. Div. 44, 80 N. Y. Supp. 288.

128, n. 161. The court may direct a sale of the part of the mortgaged land lying outside the state and a conveyance thereof to the purchaser. Mead v. Brockner, 82 App. Div. 480, 81 N. Y. Supp. 594.

128, n. 164. Pruyn v. Black, 105 App. Div. 302, 93 N. Y. Supp. 995.

131, n. 172. Crashley v. Press Pub. Co., 179 N. Y. 27, 32.

131, n. 173. Collard v. Beach, 81 App. Div. 582, 81 N. Y. Supp. 619. It is immaterial that the objection to the jurisdic-

tion was not taken on the first trial of the action or that the courts of the state where the cause of action arose will accept jurisdiction of like actions arising in the state of New York. Collard v. Beach, 93 App. Div. 339, 87 N. Y. Supp. 884.

135, n. 191. Lewis v. Guardian F. & L. Assur. Co., 93 App. Div. 157, 163, 87 N. Y. Supp. 525. This section of the Code is not in violation of the federal constitution in so far as it requires full faith and credit to be given to the judgment of a sister state nor as relating to equal privileges and immunities given to the citizens of one state in another state. Anglo-American Provision Co. v. Davis Provision Co., 169 N. Y. 506, affirmed in 191 U. S. 373. Actions between nonresidents and foreign corporations may be maintained in this state, under section 1780 of the Code of Civil Procedure, if the breach of the contract occurred within this state, no matter where the contract was made. Toronto General Trust Co. v. Chicago, B. & Q. R. Co., 32 Hun, 192; Perry v. Erie Transfer Co., 19 N. Y. Supp. 239, 28 Abb. N. C. 430, and note; Hilleary v. Skookum Root Hair Grower Co., 4 Misc. 127, 131, 23 N. Y. Supp. 1016; Gundlin v. Hamburg-American Packet Co., 8 Misc. 291, 295, 28 N. Y. Supp. 572; Delaware, L. & W. R. Co. v. New York, S. & W. R. Co., 12 Misc. 230, 33 N. Y. Supp. 1081; Shelby Steel Tube Co. v. Burgess Gun Co., 8 App. Div. 444, 40 N. Y. Supp. 871; Rosenblatt v. Jersey Novelty Co., 45 Misc. 59, 90 N. Y. Supp. 816. The courts of this state have jurisdiction of an action by resident stockholders of a foreign corporation against another foreign corporation to have declared void for fraud an agreement canceling a lease from defendant to the corporation of which plaintiffs are members. Jacobs v. Mexican Sugar Refining Co., 104 App. Div. 242, 93 N. Y. Supp. 776. When a judgment against a foreign corporation would not be effectual without the aid of the courts of a foreign country or of a sister state, and it may contravene the public policy of the foreign country or rest on the construction of a foreign statute, the interpretation of which is not free from doubt, the court should decline to assume jurisdiction. Hallenborg v. Greene, 66 App. Div. 590, 73 N. Y. Supp. 403, followed in Jacobs v. Mexican Sugar Refining Co., 44 Misc. 409, 89 N. Y. Supp. 1000. Objec-

tion cannot be urged by demurrer unless want of jurisdiction appears on the face of the complaint. MacGinniss v. Amalgamated Copper Co., 45 Misc. 106, 91 N. Y. Supp. 591.

135, § 137. Johnston v. Mutual Reserve Life Ins. Co., 43 Misc. 251, 87 N. Y. Supp. 438. The county court is one of limited jurisdiction the existence of which will not be presumed. Matter of Baker, 173 N. Y. 249, 252.

136, n. 196. Even though the rule that the jurisdiction of an inferior court is never presumed applies only to the subject-matter, and in other respects the rule as to courts of general jurisdiction obtains, it cannot avail a plaintiff suing on a judgment recovered in an inferior court on an insufficient affidavit of service, since the presumption in support of superior courts of general jurisdiction only applies to jurisdictional facts as to which the record is silent. Frees v. Blyth, 99 App. Div. 541, 91 N. Y. Supp. 103.

140, n. 220. While a state court has no jurisdiction of an action to recover on a marine contract for salvage, it has of an action to recover for services rendered to a stranded barge under a contract. Merritt & Chapman D. & W. Co. v. Tice, 77 App. Div. 326, 79 N. Y. Supp. 120.

141, n. 231. Griffith v. Dodgson, 103 App. Div. 542, 93 N. W. Supp. 155.

142, n. 241. The state courts have jurisdiction of an action merely involving the question whether a combination entered into by defendants to control the sale of copyrighted books is illegal, as in restraint of trade, though it may be necessary to construe the rights of parties under the copyright law. Straus v. American Publishers' Ass'n, 45 Misc. 251, 92 N. Y. Supp. 153.

142, § 145. See, also, Bloch v. Bloch, 42 Misc. 278, 86 N. Y. Supp. 1047. The state courts have concurrent jurisdiction with the federal courts of an action to recover the property transferred by a bankrupt to a creditor as a preference, or the value of such property. Stern v. Mayer, 99 App. Div. 427, 91 N. Y. Supp. 292. A decision by a federal court in bankruptcy proceedings, where the jurisdiction in regard to the matter decided is concurrent, will be followed by the state court. Johnson v. Woodend, 44 Misc. 524, 90 N. Y. Supp. 43.

143, n. 252. An action lies to recover damages for death caused by wrongful act in navy yard. McCarthy v. R. G. Packard Co., 105 App. Div. 436, 94 N. Y. Supp. 203.

157. There is but one supreme court in this state. It follows that there is no want of jurisdiction where an action is brought in the supreme court of one county though the parties have expressly agreed that the action should be brought in another county. Benson v. Eastern Bldg. & Loan Ass'n, 174 N. Y. 83.

158, n. 295. An action in equity to remove trustees may be maintained in the supreme court though like proceedings are pending and afterwards instituted in the surrogate's court. Westerfield v. Rogers, 174 N. Y. 230, 240.

162, n. 322. This Code section is amended by Laws 1904, c. 500, by authorizing a trial term in any county to be held in two or more parts, reserving one or more parts "for the trial of actions on sales of personal property, including agreements incident to such sales, for work, labor and services, and material furnished, upon policies of insurance and upon negotiable paper and other instruments transferable by endorsement or order."

183. Want of jurisdiction because of defendant's nonresidence cannot be waived nor can jurisdiction be obtained by consent of the parties. Perlman v. Gunn, 41 Misc. 166, 83 N. Y. Supp. 986.

184, n. 411. The official citation is Howard Iron Works v. Buffalo Elevating Co., 176 N. Y. 1.

185, n. 421. Residence of surety company which gives bonds, see Perlman v. Gunn, 41 Misc. 166, 83 N. Y. Supp. 986.

191, n. 467. While this Code provision authorizes an ex parte order by a justice of the supreme court extending the time to answer in an action brought in the county court, it does not authorize a modification of such order at the special term of the supreme court. Edwards v. Shreve, 83 App. Div. 165, 82 N. Y. Supp. 514.

207, n. 546. The court has no jurisdiction of an action by a trustee in bankruptcy to recover a preference. Dyer v. Kratzenstein, 103 App. Div. 404, 92 N. Y. Supp. 1012.

213, n. 582. Surrogate's court possesses only such jurisdiction as is conferred on it by statute. Baldwin v. Rice, 44 Misc. 64, 71, 89 N. Y. Supp. 743.

225, § 241. A justice of the supreme court who is temporarily designated to serve on the appellate division before he has decided a case tried before him at special term may decide such case after the temporary designation is revoked. Irving Nat. Bank v. Moynihan, 78 App. Div. 141, 79 N. Y. Supp. 528.

226, n. 623. This Code provision does not refer exclusively to county officers. It includes a justice of the supreme court. Matter of Town of Hadley, 44 Misc. 265, 89 N. Y. Supp. 910.

228, n. 631. This does not prevent a judge from hearing and determining an action relating to a judgment procured in an action where the judge acted as attorney, where the second action was not brought until several years afterwards and then by other attorneys, and the relation of attorney and client existing in the first case had been terminated on the rendition of judgment therein. Keeffe v. Third Nat. Bank, 177 N. Y. 305. The words "cause or matter," used in this Code provision refer only to actions or special proceedings in which a judge might sit or take part, the word "cause" meaning a cause of action and the word "matter" referring to a special proceeding. Id. This Code provision applies to criminal as well as to civil trials, and it is held in a criminal case that where a judge had acted as attorney for an alleged accomplice of the defendant, and, as such, had consulted with the defendant about the indictments pending against him, he is disqualified though the formal relation of lawyer and client never existed between the judge and the defendant. People v. Haas, 105 App. Div. 119, 93 N. Y. Supp. 790.

230, n. 642. The phrase "cause or matter," as used in this Code provision, means the particular action or special proceeding to be tried. Keeffe v. Third Nat. Bank, 177 N. Y. 305.

239, nn. 703, 704. Matter of Munson, 95 App. Div. 23, 88 N. Y. Supp. 509. The body of the order may be looked into to see whether it was made by a court or by a judge, Id. See, also, Edwards v. Shreve, 83 App. Div. 165, 82 N. Y. Supp. 514. See, also, vol. 1, p. 619.

240, n. 708. A stipulation, on settlement of the cause of action, for discontinuance, signed by plaintiff personally, can only be made effectual by an application to the court on notice to his attorney. Kuehn v. Syracuse Rapid Transit R. Co., 104 App. Div. 580, 93 N. Y. Supp. 883.

246, n. 741. Person who omits to file certificate cannot practice or hold himself out as a lawyer. Thompson v. Stiles, 44 Misc. 334, 89 N. Y. Supp. 876.

249. An attorney issuing a writ of attachment is liable to the sheriff for poundage fees. Gadski-Tauscher v. Graff, 44 Misc. 418, 89 N. Y. Supp. 1019.

249. Where an attorney recovers a judgment for his client, and which was paid by the unsuccessful party to the attorney pending an appeal, upon the reversal of the judgment, the attorney's client, who had received the benefit of the payment by being credited upon a bill rendered to him by the attorney, must restore or account for the money, although the client and the attorney had settled upon the basis that the attorney had received the amount of the judgment, and credited it to his client in the bill rendered, and upon which the settlement was made. Royal Baking Powder Co. v. Hoagland, 180 N. Y. 35.

249, n. 767. In order to recover from an attorney, costs paid to him, the plaintiff must show not only that costs in excess of legal costs were received by the attorney, but also that he had them in his possession after the making of the order which reduced the amount of the costs. If, before the making of such order, the attorney paid out the costs on the account of his client, or appropriated them to pay himself for disbursements made by himself for his client, he cannot be required to restore them. The action should be against the client, and not against the attorney. Of course, if the attorney obtained payment of the costs by deceit, he could be required to restore them, irrespective of how he had disposed of them. Rickert v. Pollock, 46 Misc. 275, 92 N. Y. Supp. 89.

250, n. 772. The court has jurisdiction to disbar an attorney for misconduct committed outside of the state and in the United States court, and with respect to the process of that court. Disbarment is proper where the attorney is guilty of perjury

and subornation of perjury in verifying a complaint in an action. In re Lamb, 105 App. Div. 462, 94 N. Y. Supp. 331.

251. A surrogate who practices as an attorney in violation of the Constitution cannot be disbarred. Matter of Silkman, 88 App. Div. 102, 84 N. Y. Supp. 1025.

253, n. 805. Matter of Brooklyn Bar Ass'n, 92 App. Div. 612, 86 N. Y. Supp. 1130.

255, n. 818. To create the relation there need be no formal written instrument. Carlisle v. Barnes, 102 App. Div. 573, 92 N. Y. Supp. 917. To establish this relation of attorney and client, it is not necessary that the attorney should have appeared as attorney in legal proceedings. Where it appears that an attorney is consulted to extricate a person from his difficulties, and that the relation commenced because of the position held by the attorney, and the attorney undertakes to act for the person consulting him, the relation of attorney and client exists. Sheehan v. Erbe, 103 App. Div. 7, 92 N. Y. Supp. 862.

255, n. 819. A contract of retainer, drawn by the attorney, should be strictly construed against him. McIlvaine v. Steinson, 90 App. Div. 77, 85 N. Y. Supp. 889.

256, n. 823. To bind a client with the knowledge of his attorney as to the existence of an incumbrance, which knowledge the attorney had acquired in some other transaction, not relating to the business of his client, the burden is on the person claiming such notice to show that knowledge of the instrument was present in the mind of the attorney at the time he acted for his client. Mathews v. Damainville, 100 App. Div. 311, 91 N. Y. Supp. 524.

257, n. 835. Sheehan v. Erbe, 103 App. Div. 7, 92 N. Y. Supp. 862; Kissam v. Squires, 102 App. Div. 536, 92 N. Y. Supp. 873; Bingham v. Sheldon, 101 App. Div. 48, 91 N. Y. Supp. 917. So held where action was by assignee of attorney. Goldberg v. Goldstein, 87 App. Div. 516, 84 N. Y. Supp. 782. The rule should not be rigorously applied where, owing to the death of the attorney, it is impossible for his representatives to make "full or plenary proof." Boyd v. Daily, 85 App. Div. 581, 587, 83 N. Y. Supp. 539. Where an attorney for an estate also acts as attorney for the purchasers of a judgment against the estate,

and the judgment was purchased at a discount though considered enforcible at its face, the administrators of the estate are entitled to have it satisfied by payment of the amount paid for it with interest. Hare v. De Young, 39 Misc. 366, 79 N. Y. Supp. 868. The exception as laid down in Clifford v. Braun is followed in Boyd v. Daily, 85 App. Div. 581, 586, 83 N. Y. Supp. 539.

257, § 306. In an action by a client against his attorney for a violation of duty in settling a claim for some $800 for $250, without authority, it is error to instruct that "when negligence has been proved, if you find there was any in consequence of which a client has lost his case, it is not incumbent on the client to show that but for the negligence, he would have succeeded in the action," where plaintiff neither alleged nor proved the value of the claim nor that it could have been collected in excess of the sum received by the attorney. Vooth v. McEachen, 181 N. Y. 28, reversing 91 App. Div. 30, 86 N. Y. Supp. 431. In an action against an attorney for negligence in loaning plaintiff's money, the burden is not on the attorney to establish that the transaction was fair and honest, since such rule applies only where the attorney obtains some property or property rights from his client. Schreiber v. Heath, 103 App. Div. 364, 92 N. Y. Supp. 1043. An attorney who fails to exercise the skill ordinarily possessed by persons with common capacity engaged in the same business in loaning money on property is liable to his client for the amount of the loss sustained by his negligence. Kissam v. Squires, 102 App. Div. 536, 92 N. Y. Supp. 873.

258, § 307. Death of attorney, before rendition of all the services, where contract is not entire, does not preclude a recovery for services previously rendered and for which compensation had become due and payable at the rate stipulated. Boyd v. Daily, 85 App. Div. 581, 587, 83 N. Y. Supp. 539. On a motion to require an attorney to prosecute an action, an order of reference to determine the amount to which the attorney is entitled as fees should not be made, since such matter is properly the subject of a separate motion. Luikert v. Luikert, 102 App. Div. 53, 92 N. Y. Supp. 97.

258, n. 840. A petition, under section 66 of the Code, by a

client, to fix the fees of her attorney, does not lie where there is a contract agreement therefor. So held where judgment was recovered under an agreement that the attorney should have fifty per cent. and thereafter the judgment debtor becomes insolvent and the client desired to accept less than one-half in satisfaction of the judgment. Serwer v. Serwer, 91 App. Div. 538, 86 N. Y. Supp. 838.

259. Liability of husband for attorney's services rendered to the wife as attorney in an action for separation, see Damman v. Bancroft, 43 Misc. 678, 88 N. Y. Supp. 386.

259, n. 845. Barry v. Third Ave. R. Co., 87 App. Div. 543, 84 N. Y. Supp. 830. The client may satisfy a judgment awarding him costs. Early v. Whitney, 106 App. Div. 399, 94 N. Y. Supp. 728. A contract of retainer to pay a certain per cent. "of whatever amount they may so collect for me" covers the costs taxed in the action as well as the damages recovered to the amount of the fixed per cent., though the costs do not belong in gross to the attorney. McIlvaine v. Steinson, 90 App. Div. 77, 85 N. Y. Supp. 889.

261, § 309. Rendition of judgment terminates the relation where the employment is merely to conduct one action. Wintner v. Rosemont Realty Co., 101 App. Div. 30, 91 N. Y. Supp. 452.

264, § 311. While the attorney cannot sue he acquires a good title which he may transfer. In an action by his donee or transferee it will be presumed that the action was brought solely in the interest of the donee or transferee, even though she be the wife of the attorney, though the court may refuse relief if it appears that the action is brought in the interest of the attorney. Beers v. Washbond, 86 App. Div. 582, 83 N. Y. Supp. 993. While an attorney cannot sue on such prohibited purchase, "he may pass title to the security either to a bona fide holder or to one who had full knowledge of the illegal purpose, and such a purchaser may have the aid of the court for the enforcement of such a security provided only that the purchase of the security and its enforcement are not in fact in the interest of the attorney." Id. A person admitted to the bar but who has never filed his certificate and has not practiced

for several years is not within this Code provision. Thompson v. Stiles, 44 Misc. 334, 89 N. Y. Supp. 876.

266, n. 888. A contract to divide a contingent fee, while not enforcible by the attorney, is enforcible against the attorney by the layman with whom the contract is made. Irwin v. Curie, 171 N. Y. 409. It follows that the proposition laid down in the text that "no cause of action can arise out of a transaction thus prohibited" must be qualified so as to apply to a cause of action in favor of the attorney.

266, n. 894. But a general or special appearance in an action by an attorney at law is presumptive evidence of the authority of the attorney so to appear. Cutting v. Jessmer, 101 App. Div. 283, 91 N. Y. Supp. 658.

269, n. 914. But see Jefferson Bank v. Gossett, 45 Misc. 630, 90 N. Y. Supp. 1049.

270, n. 920. An attorney for plaintiff has authority to stipulate that defendant shall have the same time in which to answer or demur to the complaint when served as plaintiff had in which to serve the complaint, as a condition to the granting of the stipulation extending plaintiff's time to serve the complaint. Morris v. Press Pub. Co., 98 App. Div. 143, 90 N. Y. Supp. 673.

270, n. 922. Morris v. Press Pub. Co., 98 App. Div. 143, 90 N. Y. Supp. 673. But the stipulation should not be relieved from where the parties cannot be placed in statu quo (Id.) nor in the absence of prejudice or misrepresentation. Lee v. Winans, 99 App. Div. 297, 90 N. Y. Supp. 960.

271, n. 934. That attorney has power to authorize another attorney to appear for him, and that the client is bound by such appearance, is held in Reich v. Cochran, 105 App. Div. 542, 94 N. Y. Supp. 404.

278, n. 981. Kane v. Rose, 87 App. Div. 101, 84 N. Y. Supp. 111. Such a reference is merely to take testimony and report, so that the referee cannot award costs. If the judge who orders it goes out of office pending the reference, a motion to confirm it may be made by the original attorney or his counsel before the court. Frost v. Reinach, 40 Misc. 412, 81 N. Y. Supp. 246.

278, n. 984. Where the attorney abandons the case without cause, after receiving an allowance from the court for counsel

fees pendente lite in a divorce suit, the order of substitution should not award him additional compensation. Cary v. Cary, 97 App. Div. 471, 89 N. Y. Supp. 1061.

279. The order is not objectionable because it provides no punishment in case of failure of the client to make the payment to the removed attorney. Kane v. Rose, 87 App. Div. 101, 84 N. Y. Supp. 111. The order may be conditioned on payment of the amount due the attorney of record, and where a reference has been ordered to determine the value of the services with a direction that the attorney have a lien for the amount found due him, the client who accepts the order of substitution is bound by the directions as to the lien. Id.

283. That the client can only proceed by action in the second judicial department, see Arone v. Saunders, 43 Misc. 138, 88 N. Y. Supp. 259.

292, n. 1083. Mathot v. Triebel, 98 App Div. 328, 90 N. Y. Supp. 903.

293, § 350. The lien attaches though no action has been commenced. Mathot v. Triebel, 98 App. Div. 328, 90 N. Y. Supp. 903.

295, n. 1098. See, also, Serwer v. Serwer, 91 App. Div. 538, 86 N. Y. Supp. 838.

296, § 352. The attorney has a lien on a life insurance policy placed in his hands to prepare and file proofs of loss and to collect. Matter of Sweeney, 86 App. Div. 547, 83 N. Y. Supp. 680. The attorney has a general lien on the papers of his clients which are in his possession. In re McGuire's Estate, 106 App. Div. 131, 94 N. Y. Supp. 125.

297, n. 1116. Corbit v. Watson, 88 App. Div. 467, 85 N. Y. Supp. 125.

297, n. 1117. Of course if the stipulation for discontinuance has been obtained from the plaintiff by fraud, the mere offer to pay the amount of his attorney's claim does not require that the settlement stand, but in such a case the question of fraud should be tried on amended pleadings. Kuehn v. Syracuse Rapid Transit R. Co., 104 App. Div. 580, 93 N. Y. Supp. 883.

298, n. 1123. Flannery v. Geiger, 46 Misc. 619, 92 N. Y. Supp. 785.

299, n. 1129. After a settlement, "defendant's" attorney

will not be granted leave to continue the action to obtain costs against the plaintiff. Pomeranz v. Marcus, 40 Misc. 442, 82 N. Y. Supp. 707.

300. If the attorneys see fit to bring an action in equity, the court cannot object to the application of that remedy; but, where the direction of the court is asked as to continuing the action to judgment for the benefit of the attorneys or to proceed as provided for by section 66 of the Code, the court should rarely, if ever, permit the action to be continued, but should exercise the power clearly given by section 66 of the Code, and itself determine whether a lien exists, and the amount thereof, and should then, by appropriate remedy, enforce the lien so determined to exist. Smith v. Acker Process Co., 102 App. Div. 170, 92 N. Y. Supp. 351. No order can be made under section 66 of the Code, where it is not shown what amount of compensation is claimed by the attorneys, nor that their client is not financially responsible so as to be able to pay the amount actually owing. Smith v. Acker Process Co., 102 App. Div. 170, 92 N. Y. Supp. 351.

300, n. 1134a. In an action to enforce a lien, where the cause was settled before judgment, the defendant in the original action cannot defend on the ground that the attorney's agreement for compensation was unconscionable. Morehouse v. Brooklyn Heights R. Co., 43 Misc. 414, 89 N. Y. Supp. 332.

301, n. 1135. These cases, if they may be considered as holding that the lien cannot be enforced by a petition under section 66 of the Code, are overruled by the late decisions.

301, n. 1138. Of course this applies only where, after settlement, leave is granted to prosecute or defend the original action.

301, n. 1140. On a settlement after judgment, plaintiff's attorney cannot enforce his lien against the judgment debtor where the plaintiff is solvent and able to pay. Gurley v. Gruenstein, 44 Misc. 268, 89 N. Y. Supp. 887; Corbit v. Watson, 88 App. Div. 467, 85 N. Y. Supp. 125. See, also, Witmark v. Perley, 43 Misc. 14, 86 N. Y. Supp. 756.

304. The attorney's lien on a judgment for costs is superior to any equitable right of set-off which the defendant has. Barry v. Third Ave. R. Co., 87 App. Div. 453, 84 N. Y. Supp. 830.

306, § 358. The supreme court has power to enforce the lien, under section 66, though the only services to be rendered were in connection with establishing a claim in the surrogate's court against the estate of a deceased person. Matter of Pieris, 82 App. Div. 466, 81 N. Y. Supp. 927. Instead of enforcing the lien under section 66 of the Code, the attorney may sue on his contract of retainer as for money had and received by defendant for his use. Flannery v. Geiger, 46 Misc. 619, 92 N. Y. Supp. 785.

306, n. 1168. This case must now be considered in connection with Fischer-Hansen v. Brooklyn Heights R. Co., 173 N. Y. 492, which holds that an independent action lies to enforce the lien.

306, n. 1170. If it is decided that the attorney has no lien, the court may direct him to pay over to his client the money which he retains. Radley v. Gaylor, 98 App. Div. 158, 90 N. Y. Supp. 758.

306, n. 1171. In an action to enforce the lien on a contract between the client and a third person and on the money due thereon, such third person is not a necessary party. Mathot v. Triebel, 98 App. Div. 328, 90 N. Y. Supp. 903.

307, n. 1174. Such a reference is one merely to take testimony and report the referee's opinion, so that the report is not binding on the court. The referee has no power to grant costs or an extra allowance. A motion to confirm the report is proper practice. Frost v. Reinach, 40 Misc. 412, 81 N. Y. Supp. 246.

314, n. 1218. This Code section is amended by Laws 1903, c. 467, by adding a provision prohibiting a court stenographer from becoming interested in any way in relation to the printing of any work furnished by him.

315. The fact that there is no official interpreter attached to the court does not preclude the appointment of one proposed by a party though the opposing party refuses to consent to the appointment of said person. Menella v. Metropolitan St. R. Co., 43 Misc. 5, 86 N. Y. Supp. 930.

317, n. 1229. Nature of criminal contempts, see, also, People ex rel. Stearns v. Marr, 181 N. Y. 463, 466.

319, § 381. The power to punish for contempt is inherent and

exists independent of statute. People ex rel. Stearns v. Marr, 88 App. Div. 422, 84 N. Y. Supp. 965.

321, § 383, subd. 1. Abstracting and secreting a written contract under investigation, pending the attorney's opening to the jury, is a criminal contempt. Matter of Teitelbaum, 84 App. Div. 351, 82 N. Y. Supp. 887. Desertion of the case, by an attorney, in the midst of the trial, after repeated efforts to compel the court to rescind a ruling, is punishable as a criminal contempt. People ex. rel. Chanler v. Newburger, 98 App. Div. 92, 90 N. Y. Supp. 740.

325, subd. 2. The party need not first exhaust all other remedies for making good the damages. Matter of Goslin, 95 App. Div. 407, 88 N. Y. Supp. 670.

325, n. 1273. The fact of insolvency must be shown beyond a reasonable doubt. Johnson v. Austin, 76 App. Div. 312, 78 N. Y. Supp. 501.

326. "Fictitious bail" is not limited to a false signature or to an insolvent surety but also includes bail which the obligee may not realize on, as where a party gives an undertaking with knowledge that the sole surety is a minor. Hall v. Lanza, 97 App. Div. 490, 89 N. Y. Supp. 980.

329, subd. 4. Offering money and persistently urging a wife to settle an action against her husband and to disregard her attorney's advice is not a contempt. Herrmann v. Herrmann, 82 App. Div. 437, 81 N. Y. Supp. 811.

333, § 386. A purchaser at a judicial sale may be compelled to perform by contempt proceedings though the order may also be enforced by execution. Rowley v. Feldman, 84 App. Div. 400, 82 N. Y. Supp. 679. That the persons violating an injunction were not parties to the action in which the injunction was issued does not prevent their punishment as for a criminal contempt. People ex rel. Stearns v. Marr, 181 N. Y. 463, 468.

334, n. 1335. That the injunction order was not personally served on persons violating it does not preclude punishment for criminal contempt where they had knowledge of the injunction and of its terms. People ex rel. Stearns v. Marr, 181 N. Y. 463, 470. This is so even as against one not a party to the action. Id.

336, n. 1349. Lawson v. Tyler, 98 App. Div. 10, 90 N. Y. Supp. 188.

340, n. 1369. That chemical formulas ordered to be turned over to a receiver have been destroyed by fire is no excuse for disobeying the order, where it is shown that the defendant had carried on business for a long time, and made use of the formulas in compounding medicines and that he made up and compounded such medicine without the aid, in many instances, of the written formula, and where he makes no claim of inability to reproduce. Lawson v. Tyler, 98 App. Div. 10, 90 N. Y. Supp. 188.

341, § 389. Persons not parties to the action in which the order disobeyed was granted may be punished, and this is so even though the order was not personally served on them, where they had knowledge of it. This rule covers strikers who are members of a union which has been enjoined. People ex rel. Stearns v. Marr, 181 N. Y. 463.

349. Where an action is brought in a municipal or justice court, and removed to the supreme court on a plea of title to real estate being involved, the defendant has no absolute right to the prosecution of the action in the county where the real estate is situated. Eaton v. Hall, 78 App. Div. 542, 79 N. Y. Supp. 887.

351, n. 27. An action for an accounting and sale of property brought in the names of plaintiff and defendant as trustees for their benefit and that of their associates, was held not within this Code subdivision. Barnes v. Barnhart, 102 App. Div. 424, 92 N. Y. Supp. 459.

352. That the action will also affect the title to personal property does not require the action to be tried in a county where one of the parties resides. Hall v. Gilman, 77 App. Div. 464, 79 N. Y. Supp. 307.

353. An action to compel a cemetery corporation to allow plaintiffs to remove a dead body from the cemetery to reinter it in another cemetery does not affect any right or interest in real property. Cohen v. Congregation Shearith Israel, 85 App. Div. 65, 82 N. Y. Supp. 918.

355. An action to recover back money lost on a wager, where based on 1 Rev. St. 662, §§ 8, 9, as distinguished from

Laws 1895, c. 570, § 17, is not an action for a penalty. Mendoza v. Rose, 44 Misc. 241, 88 N. Y. Supp. 938.

355, n. 51. Bell v. Polymero, 99 App. Div. 303, 90 N. Y. Supp. 920.

360, n. 88. The residence "at the time of the commencement of the action" governs. Burke v. Frenkel, 97 App. Div. 19, 89 N. Y. Supp. 621.

362, n. 101. The action is properly brought in the county in which plaintiff resides though he may also have a residence elsewhere. Bischoff v. Bischoff, 88 App. Div. 126, 85 N. Y. Supp. 81. In the first department, however, it is held that the fact that a person has apartments which he occupies while in the city of New York and has an office in such city for the transaction of business, does not make him a resident of New York city, but that the residence contemplated by the statute is a permanent residence. Washington v. Thomas, 103 App. Div. 423, 92 N. Y. Supp. 994. This last case seems to conflict with the weight of authority.

362, n. 102. Question of residence is largely one of intention. Bischoff v. Bischoff, 88 App. Div. 126, 85 N. Y. Supp. 81.

362, n. 104. In opposition to the rule laid down in the text is Rathbun v. Brownell, 43 Misc. 307, 88 N. Y. Supp. 833, which lays down the common sense rule that the residence of a party to the record who is not a necessary or proper party is to be disregarded though the fact that no relief is sought against a defendant does not make him an improper or unnecessary party.

363, n. 108. Poland v. United Traction Co., is officially reported in 88 App. Div. 281.

375, n. 403. Cestui que trust cannot sue in relation to the trust property until the trustee has refused to sue. Woolf v. Barnes, 46 Misc. 169, 93 N. Y. Supp. 219.

376. At common law an action on a bond under seal must be brought in the name of the obligee, irrespective of the owner, and this is still the rule in this state except where the same has been modified by statute. Alexander v. Union Surety & Guaranty Co., 89 App. Div. 3, 85 N. Y. Supp. 282.

376, n. 14. Whether payment of a judgment recovered by the plaintiff will fully protect the defendant from the claims

of third persons is the test whether the plaintiff is the real party in interest. St. James Co. v. Security Trust & Life Ins. Co., 82 App. Div. 242, 81 N. Y. Supp. 739; Meinhardt v. Excelsior Brewing Co., 98 App. Div. 308, 90 N. Y. Supp. 642.

379. It is no longer open to question in this state that the assignee of part of a claim may maintain an action to recover the portion which has been assigned to him. Chase v. Deering, 104 App. Div. 192, 93 N. Y. Supp. 434. An assignee of a part of an entire claim for money alleged to be due on a contract, in a suit against the debtor to recover the part assigned to him, cannot make the assignee of another part of the claim and the assignor who retains the balance of the claim, co-defendants with the debtor, where the plaintiff does not state or attempt to state any cause of action against either of such co-defendants, and where the debtor does not demand the presence of such parties but seeks to have the allegations relating thereto stricken out of the complaint as irrelevant because such facts may have the effect of changing the mode of trial. Id. One who has made a general assignment and parted with all interest in the cause of action, pending the action, and thereafter amends so as to state a new cause of action, is not the real party in interest and cannot maintain the action. Foster v. Central Nat. Bank, 93 N. Y. Supp. 603.

379, n. 25. Hunter v. Allen, 106 App. Div. 557, 94 N. Y. Supp. 880. The fact that the transaction as between the parties appears to have been merely colorable constitutes no defense on the ground that the assignee was not the real party in interest. Where an assignment is valid upon its face, a debtor will not be permitted to raise a question as to the consideration or the equities between the assignor and the assignee. Friedman v. Schulman, 46 Misc. 572, 92 N. Y. Supp. 801. That the action, in such a case, may be brought by the assignor, see Hawkins v. Mapes-Reeve Const. Co., 178 N. Y. 236, 242.

388. While ordinarily all the partners constituting a firm must join as plaintiffs in an action relating to firm business, yet where one of the partners is a trustee of an express trust in respect to the fund sought to be recovered, he may sue alone. Meinhardt v. Excelsior Brewing Co., 98 App. Div. 308, 90 N. Y. Supp. 642.

391, n. 93. Followed in Hunt v. Provident Sav. Life Assur. Soc., 77 App. Div. 338, 342, 79 N. Y. Supp. 74.

392, § 417. No action can be maintained at law between two firms having one member common to both. Taylor v. Thompson, 176 N. Y. 168, 176, 177.

403, n. 151. Cobb v. Monjo, 90 App. Div. 85, 85 N. Y. Supp. 597.

405. One whose property has been destroyed by fire may join with insurance companies who have paid their share of the loss and taken an assignment pro tanto, in an action against a railroad company, to recover the damages for negligently setting fire to the property. Jacobs v. N. Y. Cent. & H. R. R. Co., 107 App. Div. 134, 94 N. Y. Supp. 954.

406, n. 167. Where the language of the agreement is joint, all the parties to whom the obligation runs must join as plaintiffs unless the complaint shows that the nature of the interest is really several. Fisher Textile Co. v. Perkins, 100 App. Div. 19, 90 N. Y. Supp. 993.

407. In an action by a mortgagor on a fire insurance policy, the mortgagee, to whom the loss is payable to the extent of his interest, is so united in interest that where he refuses to join as plaintiff, he should be made a defendant. Lewis v. Guardian F. & L. Assur. Co., 181 N. Y. 392, 396.

413, n. 218. This applies to members of a firm. Hyde & Sons v. Lesser, 93 App. Div. 320, 87 N. Y. Supp. 878. In an equity suit, all persons materially interested, either legally or beneficially, must be joined. International Paper Co. v. Hudson River Water Power Co., 92 App. Div. 56, 66, 86 N. Y. Supp. 736.

421, n. 262. Holly v. Gibbons, 176 N. Y. 520.

422, n. 266. Schun v. Brooklyn Heights R. Co., is officially reported in 82 App. Div. 560. In an action at law, where a money judgment alone is sought, a plaintiff can neither be compelled nor permitted, under the provisions of section 452 of the Code of Civil Procedure, to bring in other parties than those he chose originally to make defendants. Ten Eyck v. Keller, 99 App. Div. 106, 91 N. Y. Supp. 169.

423, n. 272. Pope v. Manhattan R. Co. is officially reported in 79 App. Div. 583.

426, n. 289. The power to bring in as a party a purchaser pendente lite is not limited to an application before judgment. H. Koehler & Co. v. Brady, 82 App. Div. 279, 288, 81 N. Y. Supp. 695.

426, n. 292. Lehrer v. Walcoff, 47 Misc. 112, 93 N. Y. Supp. 540.

427, n. 294. An order requiring the service of an amended and supplemental summons by publication, where such summons requires the new defendant to answer the complaint, i. e., the amended complaint, is sufficient. Meeks v. Meeks, 87 App. Div. 99, 84 N. Y. Supp. 67.

428, n. 307. So the court may permit an infant to intervene, though he is neither a necessary or proper party, where the interests of the infant will otherwise not be properly guarded. Mertens v. Mertens, 87 App. Div. 295, 84 N. Y. Supp. 352; distinguished in Honigbaum v. Jackson, 97 App. Div. 527, 90 N. Y. Supp. 182. But the inherent power of the court to allow a person to intervene, if it exists, will not be exercised except in case of special circumstances. Honigbaum v. Jackson, 97 App. Div. 527, 90 N. Y. Supp. 182.

429, § 449. Strike out last sentence and insert: "The statute does not apply to an action in which a money judgment only is sought and where no title to property is involved." (See pp. 430, 431, note 322, and additional cases under **431**, n. 322 in this appendix.)

429, n. 314. The right is absolute, in the absence of laches. Draper v. Pratt, 43 Misc. 406, 89 N. Y. Supp. 356.

430, § 452. A creditor of a defendant in a mortgage foreclosure suit is not entitled to intervene. Bouden v. Long Acre Square Bldg. Co., 92 App. Div. 325, 86 N. Y. Supp. 1080. So a third person is not entitled to intervene in a foreclosure suit where the defendant merely alleges payment and denies the assignment to plaintiff of the bond and mortgage, since the action neither involves title to real property nor to specific tangible personal property. Draper v. Pratt, 43 Misc. 406, 89 N. Y. Supp. 356.

431. That the person seeking to intervene is represented in the action by a receiver is no ground for refusing the application where his rights are liable to be prejudiced by a settlement

of the action. Hosmer v. Darrah, 85 App. Div. 485, 83 N. Y. Supp. 413.

431, n. 322. Followed in Long v. Burke, 105 App. Div. 457, 94 N. Y. Supp. 277; Honigbaum v. Jackson, 97 App. Div. 527, 90 N. Y. Supp. 182; Westinghouse, Church, Kerr & Co. v. Wyckoff, 81 App. Div. 294, 81 N. Y. Supp. 49; City of Ironwood v. Coffin, 39 Misc. 278, 79 N. Y. Supp. 502.

431, n. 329. It is not sufficient to show merely a possibility of an interest is the property. Van Williams v. Elias, 106 App. Div. 288, 94 N. Y. Supp. 611.

433, § 453. The application cannot be made by a party to the action. Goldstein v. Shapiro, 85 App. Div. 83, 82 N. Y. Supp. 1038.

433, n. 350. It is believed that while ordinarily the right to intervene, where the applicant brings himself within the Code provision, is absolute, so that the order can impose no terms, yet where the applicant has been guilty of laches in moving, terms may be imposed, as they may where the intervention is allowed because of the inherent power of the court. In Hosmer v. Darrah, 85 App. Div. 485, 83 N. Y. Supp. 413, terms were imposed though the right to intervene would seem to have been absolute. In any event, the court cannot require the intervening defendant to appear and defend through the attorney employed by the other defendants. O'Connor v. Hendrick, 90 App. Div. 432, 86 N. Y. Supp. 1.

441, n. 14. A different period of time may be prescribed by an insurance policy for an action thereon. Tolmie v. Fidelity & Casualty Co., 95 App. Div. 352, 357, 88 N. Y. Supp. 717. In Wetyen v. Fick, 178, N. Y. 223, it is held that section 401 of the Code which provides that limitations do not run during the time the defendant is without the state, where he is without the state at the time the cause of action accrues, does not apply to an action for dower since "a different limitation is expressly prescribed by law," i. e., by section 1596 of the Code, so that the provisions of chapter four of the Code do not apply.

441, n. 15. People ex rel. McCabe v. Snedeker, 106 App. Div. 89, 94 N. Y. Supp. 319. To same effect, Conolly v. Hyams, 176 N. Y. 403. The cases cited in this note are distinguished in

Wetyen v. Fick, 178 N. Y. 223, which must be held to modify the rule laid down in the text as supported by the cases cited, at least in so far as the action of dower is concerned, i. e., the Wetyen case holds that none of the general Code provisions as to limitations apply to an action for dower but that section 1596 alone governs.

442, n. 19. But see Wetyen v. Fick, 178 N. Y. 223, as already explained in preceding paragraph.

445, n. 41. Colell v. Delaware, L. & W. R. Co., 80 App. Div. 342, 80 N. Y. Supp. 675.

445, n. 42. But by-laws of a fraternal insurance order cannot be changed, after the application for membership of a person, so as to shorten the time to sue, where he does not consent thereto. Butler v. Supreme Council A. L. H., 105 App. Div. 164, 93 N. Y. Supp. 1012.

448, n. 57. Code provisions applied in Chesapeake Coal Co. v. Menges, 102 App. Div. 15, 92 N. Y. Supp. 1003; Holmes v. Hengen, 41 Misc. 521, 85 N. Y. Supp. 35.

448, n. 58. Changing the limitation of the time to sue officers of a corporation for failure to file an annual report, from three years to six months, is not void as interfering with an existing property right. Davidson v. Witthaus, 106 App. Div. 182, 94 N. Y. Supp. 428.

449, n. 61. Six months held a reasonable time where limitation of actions for failure of officers of corporation to file their annual report was changed from three years to six months. Davidson v. Witthaus, 106 App. Div. 182, 94 N. Y. Supp. 428.

449, n. 64. Matter of Moench's Estate, 39 Misc. 480, 80 N. Y. Supp. 222; Matter of Guttoff's Estate, 39 Misc. 483, 80 N. Y. Supp. 219.

454, n. 89. A stranger cannot rely on the statute. Perry v. Williams, 40 Misc. 57, 81 N. Y. Supp. 204. The successor of a municipal corporation may plead the statute the same as could its predecessor. Kahrs v. City of N. Y., 98 App. Div. 233, 90 N. Y. Supp. 793. The defense of limitations may be set up by the assignee of a second mortgage in an action to reform the discharge of a first mortgage and to foreclose such mortgage. Perry v. Fries, 90 App. Div. 484, 85 N. Y. Supp. 1064.

454, n. 95. The proposition that "a foreign corporation sued in the state court can avail itself of the statute of limitations" should read "cannot," and the cases cited so hold and are followed in Gray Lith. Co. v. American Watchman's Time Detector Co., 44 Misc. 206, 88 N. Y. Supp. 857.

458, n. 118. Construction of section 1499 of the Code, see post, **484**, n. 292.

460. There must be an adverse entry. Hindley v. Manhattan R. Co., 103 App. Div. 504, 93 N. Y. Supp. 53.

460, n. 132. Possession under a tax lease is not adverse. Miller v. Warren, 94 App. Div. 192, 87 N. Y. Supp. 1011.

462, n. 139. Piles driven outside of a dock, but not used, do not constitute a substantial inclosure. Fortier v. Delaware, L. & W. R. Co., 93 App. Div. 24, 86 N. Y. Supp. 896.

467, n. 164. The amendment of 1894 extended the twenty year rule to judgments of courts not of record "thereafter" docketed with the county clerk. Matter of Guttroff's Estate, 39 Misc. 483, 80 N. Y. Supp. 219.

473, n. 214. It seems, however, that where there is a "demand due" the six year statute applies. For instance, six years is the limitation where a beneficiary sues to recover a money judgment against the personal representatives of one acting in a fiduciary capacity. Libby v. Van Derzee, 80 App. Div. 494, 81 N. Y. Supp. 139. So a motion to compel an executor of a trustee to account for specific moneys which the trustee had received is a proceeding to recover a demand that is due and as such is not governed by the ten years' statute but is barred in six years in analogy to an action at law. Matter of Cruikshank's Estate, 40 Misc. 325, 81 N. Y. Supp. 1029, which refuses to follow Matter of Longbotham, 38 App. Div. 607, 57 N. Y. Supp. 118, in so far as it applies to all actions for an accounting.

473, n. 215. See preceding paragraph.

474, n. 220. Actions on sealed instruments are not limited to six years. City of N. Y. v. Third Ave. R. Co., 42 Misc. 599, 605, 87 N. Y. Supp. 584. An action against the administrator of an executor to recover moneys collected by the executor, where no accounting is demanded, is an action on an implied

contract which must be brought within six years. Constantine v. Constantine, 91 App. Div. 607, 87 N. Y. Supp. 139. In an action on an account stated, where the complaint showed that the items of the account extended over a period of more than seven years prior to the time the account was stated, and it did not necessarily appear that it was an open mutual running account against which the statute of limitations would not run until the date of the last item, and the account stated is not shown to be in writing or assented to in writing, and there is no allegation of an adjustment of differences constituting a consideration for the payment of outlawed claims, the statute of limitations may be interposed to those items against which the statute had run. Delabarre v. McAlpin, 101 App. Div. 468, 92 N. Y. Supp. 129.

474, n. 224. This six year limitation is not affected by Laws 1896, c. 910, which provides that when an assessment has been annulled by judgment, the amount thereof may be refunded, and if not refunded within one year from such judgment an action may be brought to recover the same. Dennison v. City of N. Y., 182 N. Y. 24.

480, n. 262. This limitation of three years is changed to six months by Laws 1901, c. 354, which applies to a right of action accruing under the prior laws. Davidson v. Witthaus, 106 App. Div. 182, 94 N. Y. Supp. 428.

480, n. 264. This Code provision applies to directors and stockholders of foreign as well as domestic corporations. Platt v. Wilmot, 193 U. S. 602. A "moneyed corporation" is a corporation having banking powers or the power to make loans on pledges or deposits, or authorized by law to make insurances. Id. The liability is created "by the common law or by statute" where the statute is the foundation for the implied contract arising from the purchase of or subscription for stock. Id.

482, n. 278. The words "personal injuries," as used in this statute, include injuries resulting in death, and apply to actions authorized by section 1902 of the Code, if against municipalities having 50,000 inhabitants or over. Titman v. City of N. Y., 57 Hun, 469, 10 N. Y. Supp. 689; Littlewood v. City of N. Y., 89 N. Y. 24; Curry v. City of Buffalo, 57 Hun, 25, 10 N. Y. Supp.

392; Crapo v. City of Syracuse, 98 App. Div. 376, 90 N. Y. Supp. 553.

483, n. 286. The limitation of two years specified in section 1902 of the Code, within which an action for negligence resulting in death must be commenced, was changed by chapter 572, p. 801, of the Laws of 1886, when brought against a city in the state having 50,000 inhabitants or over. As to such actions the limitation is one year after the cause of action accrues, the act superseding and taking the place of the provision of the Code in that regard. Crapo v. City of Syracuse, 98 App. Div. 376, 90 N. Y. Supp. 553.

483, n. 287. Construction of section 1499 of the Code, see next paragraph.

484, n. 292. Section 1499 of the Code only applies where the owners of both pieces of land have erected buildings whose walls abut one on the other, and who have thereby apparently made a practical location of the boundary line. Bergman v. Klein, 97 App. Div. 15, 89 N. Y. Supp. 624.

485. Limitations begin to run from the time of death, in an action to recover damages for causing death by wrongful act, rather than from the date of issuing letters of administration. Crapo v. City of Syracuse, 98 App. Div. 376, 90 N. Y. Supp. 553. Service by mail of notice of rejection of claim is a sufficient service to start running the six months within which an action must be brought on a claim against a decedent. Heinrich v. Heidt, 106 App. Div. 179, 94 N. Y. Supp. 423. Lapse of time is never a bar to a claim against the state so long as there is no tribunal to which the claim may be presented and by which it may be passed on and payment awarded. People ex rel. Essex County v. Miller, 181 N. Y. 439, 446. A cause of action in favor of an infant to impress a trust on real estate purchased at a foreclosure sale by his guardian accrues at the time of the purchase and not at the time the infant reaches his majority. Cahill v. Seitz, 93 App. Div. 105, 86 N. Y. Supp. 1009.

489, n. 315. Limitations do not run in favor of an executor so as to bar an action for an accounting which involves the construction of the will, where the executor has not repudiated his trust but has merely made a mistake in his interpretation of the

will. Thorn v. De Breteuil, 86 App. Div. 405, 433–435, 83 N. Y. Supp. 849. A trustee who sets up limitiations as a defense must allege not only lapse of time but also such lapse of time after a repudiation of the trust. Matter of Meyer's Estate, 98 App. Div. 7, 90 N. Y. Supp. 185.

492, n. 334. Matter of Meyer's Estate, 98 App. Div. 7, 90 N. Y. Supp. 185.

493. Where a certificate of stock is deposited as collateral but the identical certificate is to be returned on the payment of the principal obligation, the statute does not begin to run against an action to recover the stock until after a demand for the return of the stock. Brown v. Bronson, 93 App. Div. 312, 318, 87 N. Y. Supp. 872.

494, n. 346. An action by a ward to recover a money judgment against the executors of her general guardian must be brought within six years after the ward comes of age, without regard to when the ward learned that the guardian had received money not accounted for. Libby v. Van Derzee, 80 App. Div. 494, 81 N. Y. Supp. 139. Limitations begin to run against a cause of action to recover damages for the failure of an attorney to record a mortgage as he had agreed to, from the date of the breach of the agreement, and not from the date of the discovery thereof. Crowley v. Johnston, 96 App. Div. 319, 89 N. Y. Supp. 258.

494, n. 349. See, also, Perry v. Williams, 40 Misc. 57, 81 N. Y. Supp. 204. The statute does not commence to run when the instrument is delivered. Brennan v. Thompson, 46 Misc. 317, 94 N. Y. Supp. 684.

495, n. 352. The rule applies to an action to recover lands and for an accounting where an administrator permitted lands of the estate to be sold for taxes, though he had personalty in hand to pay the taxes, and himself bid them in and took a tax title in his own name. Kelly v. Pratt, 41 Misc. 31, 83 N. Y. Supp. 636. But the rule does not apply to an action by the owners of the equity of redemption to avoid a foreclosure deed, in which the guardian ad litem of infant defendants was the purchaser, and to declare the trust. Dugan v. Sharkey, 89 App. Div. 161, 85 N. Y. Supp. 778.

496, n. 356. Slayback v. Raymond, 93 App. Div. 326, 87 N. Y. Supp. 931.

497, n. 361. Meehan v. Figliuolo, 88 N. Y. Supp. 920.

500, n. 377. See, also, Brown v. Bronson, 93 App. Div. 312, 316, 87 N. Y. Supp. 872.

505, n. 406. This Code rule does not apply to an action for dower. Wetyen v. Fick, 178 N. Y. 223.

506, n. 416. Lawrence v. Hogue, 105 App. Div. 247, 93 N. Y. Supp. 998.

510, n. 434. This Code rule applies to an action to foreclose a mechanic's lien, though the period of limitations is governed by the lien law. Conolly v. Hyams, 176 N. Y. 403. It also applies to special procedings. So held where the relator mistook his remedy in bringing mandamus instead of certiorari. People ex rel. McCabe v. Snedeker, 106 App. Div. 89, 94 N. Y. Supp. 319.

511, n. 440. This applies to a special proceeding brought in behalf of an infant. Matter of Pond's Estate, 40 Misc. 66, 81 N. Y. Supp. 249.

514. Where the only change effected by an amended summons and complaint was to correct the defect in the designation of the defendant company by striking out the words "as substituted trustee," etc., the action must be considered to have been commenced when the original summons was served. Boyd v. United States Mortg. & Trust Co., 94 App. Div. 413, 88 N. Y. Supp. 289.

519, n. 490. But it is not only the right, but the duty, of an executor, to pay the debts of the decedent, and his acknowledgment thereof, by making payments thereon from time to time, prevents the running of limitations where it has not run before such payments are made. Holly v. Gibbons, 176 N. Y. 520.

521. There is a sufficient acknowledgment and promise where defendant sent plaintiff's intestate a bill for services rendered to a third person, and intestate replied that the matter would have his earliest attention, and that he considered himself responsible for the bill. Serrell v. Forbes, 106 App. Div. 482, 94 N. Y. Supp. 805. But merely "looking over" an account does not remove the bar. Matter of Goss, 98 App. Div. 489, 90 N. Y. Supp. 769.

521, n. 497. An offer to give "a due bill as an acknowledgment" is sufficient. Benedict v. Slocum, 95 App. Div. 602, 88 N. Y. Supp. 1052.

522, n. 511. Kahrs v. City of N. Y., 98 App. Div. 233, 90 N. Y. Supp. 793.

523, n. 518. Where plaintiff bought shares of stock for defendant and paid in cash the market value, a letter, in reply to a demand for payment of the indebtedness, stating, inter alia, that "you may rest assured that I will pay you every dollar I owe you within a short time. I am largely interested in a transaction at present; when that is closed up you will surely hear from me substantially," is sufficient as a new promise. Levy v. Popper, 106 App. Div. 394, 94 N. Y. Supp. 905.

526, § 519. The test is whether the facts would support a plea of payment. A credit, in the debtor's books, to an account of a third person, not shown to have been authorized by the creditor, or to have been acquiesced in by him, is not such a payment as will bar the running of the statute. Kirkpatrick v. Goldsmith, 81 App. Div. 265, 80 N. Y. Supp. 835.

526, n. 542. Drawing an order with instructions to "charge same to my account" does revive outlawed claims where a claim not outlawed existed to which claim the payment might be applied. Shafer v. Pratt, 79 App. Div. 447, 80 N. Y. Supp. 109.

527, n. 545. See, also, Jefferson County Nat. Bank v. Dewey, 181 N. Y. 98, 106. In this case the indorsers of a note paid the balance to the payee after a judgment against the maker and a partial recovery against the maker by the means of a creditor's suit. The note was delivered to the indorsers pending an appeal in the creditor's suit which resulted in the payee being required to refund the amount received in the creditor's action. It was held that the payments made by the indorsers were part payments so as to enable the payee to sue them for the balance remaining due where the action was brought within six years after such payments.

528, n. 548. An unauthorized payment by the widow on a mortgage indebtedness upon property in which she has but a homestead and dower interest will not operate to remove the bar of the statute of limitations from the indebtedness, as

against the heirs who own the fee. Nickell v. Tracy, 100 App. Div. 80, 91 N. Y. Supp. 287.

532. An unsigned indorsement made after a note is outlawed is not sufficient to show part payment where the indorsement is not in the handwriting of the maker nor shown to have been made with his privity. Matter of Salisbury, 41 Misc. 274, 84 N. Y. Supp. 215.

535, n. 3. Allegations in a verified pleading, one of the moving papers, are to be treated as if contained in a separate affidavit. Newman v. West, 101 App. Div. 288, 91 N. Y. Supp. 740.

538, n. 22. Where not amended, affidavit is a nullity. Frees v. Blyth, 99 App. Div. 541, 91 N. Y. Supp. 103.

542. Where the complaint is one of the moving papers, a verification on information and belief, without stating the sources thereof, is of no effect. Samuel Cupples Envelope Co. v. Lackner, 99 App. Div. 231, 90 N. Y. Supp. 954.

546, § 531. Of course if the facts are peculiarly within the knowledge of the attorney, he should make the affidavit, rather than the client. Kent v. Aetna Ins. Co., 88 App. Div. 518, 85 N. Y. Supp. 164.

546, n 66. A & S. Henry & Co. v. Talcott, 89 App. Div. 76, 85 N. Y. Supp. 98; Treadwell v. Clark, 45 Misc. 268, 92 N. Y. Supp. 166. It is no excuse that the client is a nonresident. Fox v. Peacock, 97 App. Div. 500, 90 N. Y. Supp. 137.

549, n. 84. But an affidavit taken before an attorney of record in the action is not "void." Baumeister v. Demuth, 84 App. Div. 394, 398, 82 N. Y. Supp. 831.

550, § 534. While affidavits may be withdrawn and new ones substituted, there is no authority in the court to amend an affidavit. McNamara v. Wallace, 97 App. Div. 73, 76, 89 N. Y. Supp. 591.

559, n. 131. Lawton v. Kiel, 50 Barb. 30, which does not agree with the proposition stated in the text, is followed in Rosenblatt v. Jersey Novelty Co., 45 Misc. 59, 90 N. Y. Supp. 816, which holds that the certificates to authenticate the notary's signature, though omitted altogether, may be supplied to perfect moving papers.

562. An affidavit that "deponent has fully and fairly stated

his defense to said action and all the facts relative thereto to his counsel is sufficient." "Thereto" refers to "action," and "action" is synonymous to "case," so that the clause should be construed to read, "and all the facts relative to the 'action'—i. e., 'case.'" Larocque v. Conhaim, 45 Misc. 234, 92 N. Y. Supp. 99.

570, n. 10. In Lee v. Winans, 99 App. Div. 297, 90 N. Y. Supp. 960, it was held improper to grant a motion on affidavit where the Code required a petition.

575, n. 43. Matter of National Gramaphone Corp. Directors, 82 App. Div. 593, 81 N. Y. Supp. 853.

576, n. 51. Facts alleged in the moving affidavits cannot be considered contradicted by statements of conclusions in counter-affidavits. Boyle v. Standard Oil Co., 102 App. Div. 622, 92 N. Y. Supp. 677.

577, n. 60. Chapins v. Long, 77 App. Div. 272, 274, 78 N. Y. Supp. 1046. That defendant, after service of papers on a motion to require plaintiff to pay the costs of a former action against another defendant, procured an assignment of the judgment for such costs from the judgment creditor, is not ground for granting the motion. Tanzsheim v. Brooklyn, Q. C. & S. R. Co., 106 App. Div. 233, 94 N. Y. Supp. 534. If new facts are discovered after the motion is made, the court may, in its discretion, postpone the hearing and allow others to be served. Northrup v. Village of Sidney, 97 App. Div. 271, 274, 90 N. Y. Supp. 23.

578, n. 70. This Code provision applies equally well to motions after judgment, such as a motion for a new trial. O'Connor v. McLaughlin, 80 App. Div. 305, 80 N. Y. Supp. 741.

578, n. 73. See, also, People ex rel. Tuell v. Paine, 92 App. Div. 303, 86 N. Y. Supp. 1109, where the motion was denied in contempt proceedings because the testimony could be taken directly in the contempt proceeding. "It must be made to appear, first, that the person sought to be examined can, and, if compelled, will, swear to the facts desired; and, secondly, that the facts to which he can swear are relevant to the motion. The proceeding is not intended to be used as one for the general examination of witnesses, and no good purpose is to be served by putting questions which will elicit denials of the facts sought to be established." If it is shown that the parties will not

swear to the facts which the moving party seeks to establish by their depositions, because they claim that such facts do not exist, the motion should be refused. Calvet-Rogniat v. Mercantile Trust Co., 46 Misc. 20, 93 N. Y. Supp. 241.

583. Rule 37 of the General Rules of Practice which provides that "all motions made at special or trial terms shall be brought before the court on notice," followed in Delahunty v. Canfield, 106 App. Div. 386, 94 N. Y. Supp. 815.

585, n. 115. Van Wickle v. Weaver Coal & Coke Co., 88 App. Div. 603, 85 N. Y. Supp. 82; Rallings v. McDonald, 76 App. Div. 116, 78 N. Y. Supp. 1040. Want of jurisdiction is not an irregularity which must be specified in the notice of motion. Armstrong v. Loveland, 99 App. Div. 28, 90 N. Y. Supp. 711. The rule does not apply where the order is based on the merits. Norden v. Duke, 106 App. Div. 514, 94 N. Y. Supp. 878.

590, § 584. An order to show cause cannot be made in a proceeding not yet pending and over which the court has not acquired jurisdiction. Matter of Quick, 92 App. Div. 131, 87 N. Y. Supp. 316.

591, n. 155. Schiller v. Weinstein, 45 Misc. 591, 91 N. Y. Supp. 76; Stryker v. Churchill, 39 Misc. 578, 80 N. Y. Supp. 588; Sanger v. Connor, 95 App. Div. 521, 88 N. Y. Supp. 1054; Cole v. Smith, 84 App. Div. 500, 82 N. Y. Supp. 982. The objection cannot, however, be first urged on appeal. Austrian B. F. Co. v. Wright, 43 Misc. 616, 88 N. Y. Supp. 142. The omission is ground for denying the order sought, where raised on the return of the order to show cause and before the hearing. Sanger v. Connor, 95 App. Div. 521, 88 N. Y. Supp. 1054. However, it is no objection to a motion made on behalf of the defendant upon the return of an order requiring the plaintiff to show cause why an order should not be made determining and declaring that the defendant is not in default for failure to appear and answer herein, or, should it be determined that defendant is in default, then opening such default and allowing the defendant to serve an amended answer that "the affidavit upon which the order to show cause was granted does not state the time appointed for holding the next trial term in this county," since the very purpose of the motion is to determine whether the ac-

tion is at issue. Sweeney v. O'Dwyer, 45 Misc. 43, 90 N. Y. Supp. 806.

596, n. 186. Delahunty v. Canfield, 106 App. Div. 386, 94 N. Y. Supp. 815.

597, § 593. If the pleading, concerning which the motion is made, is served by mail, the party served has double time to make any motion relating to such pleading. Borsuk v. Blauner, 93 App. Div. 306, 87 N. Y. Supp. 851.

605, n. 243. In re Schlotterer, 105 App. Div. 115, 93 N. Y. Supp. 895. The special term of the supreme court cannot modify an order made by a justice of the supreme court, out of court, in an action pending in the county court. Edwards v. Shreve, 83 App. Div. 165, 82 N. Y. Supp. 514.

605, n. 246. Matter of White, 101 App. Div. 172, 91 N. Y. Supp. 513.

609, § 605. The motion cannot be determined on facts occurring after the motion papers are served. Tanzsheim v. Brooklyn, Q. C. & S. R. Co., 106 App. Div. 233, 94 N. Y. Supp. 534.

612, n. 293. Schiller v. Weinstein, 45 Misc. 591, 91 N. Y. Supp. 76.

613, n. 298. Headdings v. Gavette, 86 App. Div. 592, 83 N. Y. Supp. 1017. But if unlawful relief is sought, it will not be granted even though there is no opposition. It follows that the failure of the opposing party to appear on the return day does not waive his right to move, on excusing his default, to amend the order by striking out a provision improperly inserted. People ex rel. N. Y. Realty Corp. v. Miller, 92 App. Div. 116, 87 N. Y. Supp. 341.

619, n. 19. Matter of Munson, 95 App. Div. 23, 88 N. Y. Supp. 509. See, also Edwards v. Shreve, 83 App. Div. 165, 82 N. Y. Supp. 514.

619, n. 22. Lawson v. Speer, 91 App. Div. 411, 86 N. Y. Supp. 915. That caption of order is that of a judge's order instead of a court order is not fatal, see Lawson v. Speer, 91 App. Div. 411, 86 N. Y. Supp. 915.

620, n. 28. If the order does not specify all the motion papers, relief will be granted on a motion for a resettlement of the order. Davis v. Reflex Camera Co., 99 App. Div. 567, 90 N. Y. Supp. 877.

627. Service is necessary to stay proceedings where costs are not paid. Sire v. Shubert, 93 App. Div. 324, 87 N. Y. Supp. 891.

639, n. 149. Garner v. Hellman, 47 Misc. 336, 93 N. Y. Supp. 431. Tracy v. Falvey, 102 App. Div. 585, 92 N. Y. Supp. 625.

640. A motion to vacate or reduce a judgment is not a renewal of a motion to open the default. Sutherland v. Mead, 80 App. Div. 103, 106, 80 N. Y. Supp. 504.

643, n. 178. Klipstein & Co. v. Marchmedt is reported in 39 Misc. 794.

644. A party should not be permitted to renew a motion, after a considerable expenditure by the opposing party, without payment of the costs by the unsuccessful party, especially where the merits of the application were not passed on owing to deficiencies in the moving papers. Wasserman v. Benjamin, 91 App. Div. 547, 86 N. Y. Supp. 1022.

644, n. 189. Murphy v. Kelly, 89 App. Div. 619, 85 N. Y. Supp. 912.

644, § 639. A motion for a reargument should not be granted after the time to appeal has expired. Klipstein & Co. v. Marchmedt, 39 Misc. 794, 81 N. Y. Supp. 317.

648, n. 12. In a dissenting opinion, it is held that this rule as to the failure to return papers only applies to papers that can be properly served in the due course of procedure, and has no reference to an unauthorized and void notice. Honsinger v. Union Carriage & Gear Co., 175 N. Y. 229, 234.

652, n. 35. Section 74 of the Executive Law, added by amendment in 1893, abolished the state paper and provided that notices to be published in the state paper be published in the county of the place of trial in a newspaper to be designated by the court or judge.

654, n. 1. Personal service of the original process claimed to be disobeyed is necessary to bring a party into contempt. Goldie v. Goldie, 77 App. Div. 12, 16, 79 N. Y. Supp. 268.

655, n. 10. The service should be personal where the paper is to bring a party into contempt. Goldie v. Goldie, 77 App. Div. 12, 79 N. Y. Supp. 268.

658, n. 37. It is not sufficient to drop in the office letter box

of an attorney a paper not enclosed in a wrapper and not directed to him. Fitzgerald v. Dakin, 101 App. Div. 261, 91 N. Y. Supp. 1003.

661, n. 62. But if the attorney to whom the papers are sent pays the amount of excess postage and receives the package containing the papers, he cannot return them, after inspection, as irregularly served. Appeal Printing Co. v. Sherman, 99 App. Div. 533, 91 N. Y. Supp. 178.

663, n. 70. Service of a pleading by mail gives forty days to move to make it more definite and certain. Borsuk v. Blauner, 93 App. Div. 306, 87 N. Y. Supp. 851. Service of an answer by mail gives the plaintiff forty days, i. e., double time, to serve an amended complaint as of course. Bucklin v. Buffalo, A. & A. R. Co., 41 Misc. 557, 85 N. Y. Supp. 114. Service of a judgment or order by mail doubles the time allowed to move, under section 724 of the Code, to set aside the judgment or order because of mistake, inadvertence, etc. Atkinson v. Abraham, 78 App. Div. 489, 79 N. Y. Supp. 680.

684, n. 95. The proposition that "where no adverse decision has been made, the parties to an undertaking may, in good faith, agree on a recovery which shall be binding on the surety," while supported by the case cited, is a too broad statement of the law, at least in so far as undertakings on appeal are concerned, since Foo Long v. American Surety Co., 146 N. Y. 251, 256, holds that a pro forma affirmance of a judgment on appeal based solely on the stipulation of the parties is not such an affirmance as will bind the sureties on an appeal bond.

684, § 677. Section 812 of the Code contemplates two proceedings by a surety. The one is ex parte as to creditors, for the release of the surety from liability for the "future" acts or omissions of his principal; the other is on notice to all parties interested for release from all acts and omissions past and future. Siebert v. Milbank, 95 App. Div. 566, 88 N. Y. Supp. 993.

686, n. 107. O'Connor v. Walsh, 83 App. Div. 179, 183, 82 N. Y. Supp. 499.

688, n. 122. The obtaining of leave to sue is an essential fact which must be alleged in the complaint. Goldstein v. Michelson, 45 Misc. 601, 91 N. Y. Supp. 33.

692, n. 3. Section 1778 of the Code presents an exception to this rule in that it provides that the time to answer or demur can be extended only by the court, on notice, in an action against a corporation to recover damages for the nonpayment of a note, or other evidence of debt, for the absolute payment of money, on demand, or at a particular time.

695. An action is not begun "within" twenty years where the cause of action arose June 27, 1884, and the summons was delivered for service June 27, 1904, notwithstanding that June 26, 1904, came on Sunday. Vose v. Kuhn, 45 Misc. 455, 92 N. Y. Supp. 34. Sunday is to be excluded when it is the last day in a period of days and not when it is the last day in a period of years. Benoit v. New York Cent. & H. R. R. Co., 94 App. Div. 24, 28, 87 N. Y. Supp. 951.

696, n. 21. Where notice of an injury is required to be given within one month, and the injury occurs on the tenth, the computation is from the tenth so that the notice must be served on or before the tenth of the succeeding month. Biggs v. City of Geneva, 100 App. Div. 25, 90 N. Y. Supp. 858.

696, n. 22. Benoit v. New York Cent. & H. R. R. Co., 94 App. Div. 24, 87 N. Y. Supp. 951; Vose v. Kuhn, 45 Misc. 455, 92 N. Y. Supp. 34.

708, nn. 49, 50. That the appellate division may, in certain cases, exercise its own discretion, on appeal, though no actual abuse of discretion in the court below is found, see Lawson v. Hilton, 89 App. Div. 303, 85 N. Y. Supp. 863.

717, n. 47. See, also, Goldberg v. Markswitz, 94 App. Div. 237, 87 N. Y. Supp. 1045.

718, n. 53. Effect of service of complaint, subsequent to service of summons, stating a different place of trial, see post, **919** nn. 6, 7.

729, § 709. See, also post, **881**, n. 463.

730, n. 18. Kinsey v. American Hardwood Mfg. Co., 94 N. Y. Supp. 455.

734, n. 55. Proof by affidavit that a warrant of attachment has been granted is necessary. Wilson v. Lange, 40 Misc. 676, 83 N. Y. Supp. 180.

735, § 717. Service in a crowded depot, where reporters and

others were trying to reach defendant who was handcuffed to a detective and carried a bag in the other hand, by thrusting the paper in the face of the prisoner which act was forcibly repulsed by the detective, is insufficient, where defendant did not know that he was being served and the summons fell to the floor and was not picked up. Anderson v. Abeel, 96 App. Div. 370, 89 N. Y. Supp. 254. The fact that the summons and complaint is found upon the floor of a house or in the street by a defendant in an action, or is delivered to a defendant in the action by one so finding it, is not the service that the Code requires, and defendant is under no obligation to appear and answer because a copy of the summons in an action in which he is named as a defendant comes incidentally into his possession, when there is no delivery of the summons as a service upon him. Under such circumstances the defendant is justified in waiting until the judgment is sought to be enforced. The question of laches cannot be considered, as the defendant has the legal right to have the judgment set aside at any time upon it appearing that it had been entered without actual service of the summons. O'Conriell v. Gallagher, 103 App. Div. 61, 93 N. Y. Supp. 643.

739, n. 92. The court may go further than merely appointing a person on whom to serve a copy of the summons, by making the provisions of the order broad enough to enable the person appointed to look after the interests of the defendant at every stage of the action. American Mortg. Co. v. Dewey, 106 App. Div. 389, 94 N. Y. Supp. 808.

742. The fact that the service of the summons and the copy served comes to the attention of the corporation served, in due time, does not validate a service on one not enumerated in the Code as a person on whom service may be made. Eisenhofer v. New Yorker Zeitung Pub. & Print. Co., 91 App. Div. 94, 86 N. Y. Supp. 438. A mere clerk who receives payment of a bill due the corporation is not the cashier who may be served. "The" cashier is the one who has charge of the funds of the corporation and has the right to take charge thereof to the exclusion of every person. Id.

743, n. 123. Yorkville Bank v. Henry Zeltner Brewing Co.,

80 App. Div. 578, 80 N. Y. Supp. 839. It seems, however, that if the resignation is made in bad faith to throw the company into the hands of a receiver, and is held by the courts to be ineffective, the service is good. Zeltner v. Henry Zeltner Brewing Co., 85 App. Div. 387, 83 N. Y. Supp. 366.

745, n. 133. A different rule prevails in the federal courts in construing the New York Code provisions. Goldey v. Morning News, 156 U. S. 518, followed in Conley v. Mathieson Alkali Works, 190 U. S. 406.

746, n. 138. The agency to accept service, if shown, will suffice, whether the corporation is doing business within the state at the time or not. Johnston v. Mutual Reserve Life Ins. Co., 45 Misc. 316, 90 N. Y. Supp. 539.

747, n. 143. The power to accept service is not revocable so as to affect any outstanding liabilities within the state upon contracts made while the corporation was doing business; the statute of 1899 is to be read as a mere continuation of the laws in force when a contract was made, which required the designation of an agent to accept service; and this requirement is within the power of the state to impose as a condition to the permission to a foreign corporation to do business within its borders. Woodward v. Mutual Reserve Life Ins. Co., 178 N. Y. 485; Johnston v. Mutual Reserve Life Ins. Co., 45 Misc. 316, 90 N. Y. Supp. 539.

747, n. 146. Doherty v. Evening Journal Ass'n, 98 App. Div. 136, 90 N. Y. Supp. 671.

747, next to last sentence. It is essential that the foreign corporation should have property within this state, or that the cause of action arose here, in order to warrant service upon a cashier, director, or managing agent. Doherty v. Evening Journal Ass'n, 98 App. Div. 136, 90 N. Y. Supp. 671.

748, n. 149. See, ante, **742**.

749. A person who collects and remits the dues of members of a fraternal insurance association is not a managing agent thereof. Moore v. Monumental Mut. Life Ins. Co., 77 App. Div. 209, 78 N. Y. Supp. 1009.

749, n. 160. Fontana v. Post Printing & Pub. Co., is officially reported in 87 App. Div. 233.

751. It is questionable whether substituted service is allowable in an action for a divorce. Maiello v. Maiello, 42 Misc. 266, 86 N. Y. Supp. 543.

752. In an action for a divorce, a substituted service should not be permitted, in any event, unless the moving papers show that service cannot be made by publication. Maiello v. Maiello, 42 Misc. 266, 86 N. Y. Supp. 543.

753, n. 14. Maiello v. Maiello, 42 Misc. 266, 86 N. Y. Supp. 543. The moving papers must show that the defendant is a resident. Lynch v. Eustis, 85 N. Y. Supp. 1063.

761, n. 15. This applies to an action for dower where there are no tenants or occupants within the state. Wetyen v. Fick, 178 N. Y. 223, 233.

767, n. 53. There must be some competent proof of nonresidence. Empire City Sav. Bank v. Silleck, 98 App. Div. 139, 90 N. Y. Supp. 561.

767, n. 55. The certificate of a sheriff that he has used due diligence, where the certificate is not made a part of, or referred to, in the moving papers, is insufficient. Empire City Sav. Bank v. Silleck, 98 App. Div. 139, 90 N. Y. Supp. 561.

768, n. 60. Kennedy v. Lamb, 182 N. Y. 228, which reverses 102 App. Div. 429, 92 N. Y. Supp. 385. In this case the affidavit showed that the defendant resided in New Jersey and stated that "the plaintiff will be unable with due diligence to make personal service of the summons" but showed no attempt to make personal service nor excuse for not trying except that defendant resided in New Jersey. It was held that no jurisdiction was conferred on the judge to grant the order, which could be collaterally attacked. In such a case, is not sufficient to merely follow the words of the statute, but the facts must be stated to show the efforts made to personally serve the summons within the state.

781, § 756. Section 1557, subdivision 1, of the Code expressly provides that so much of section 445 as requires the court to allow a defendant to defend after final judgment does not apply to an action for partition.

794, n. 4. The objection cannot be raised by answer. Nellis v. Rowles, 41 Misc. 313, 84 N. Y. Supp. 753.

796, n. 20. Where one, by mistake but with notice which should have put him on inquiry, sues an individual as such when he should have sued a corporation of which the person sued was the president, an amendment will not be allowed, though the statute of limitations has, in the interim, become a bar to an action against the corporation. Licausi v. Ashworth, 78 App. Div. 486, 79 N. Y. Supp. 631.

797, n. 26. Prior to the trial, the words "as substituted trustee under the will of * * * deceased," after the name of defendant, may be allowed to be stricken out of the title of the summons and complaint, notwithstanding the statute of limitations would bar a new action against the defendant in its individual capacity. Boyd v. United States Mort. & Trust Co., 84 App. Div. 466, 82 N. Y. Supp. 1001.

799, n. 48. If the person served is notified in writing that no claim is made against him individually, he cannot compel plaintiff's attorney to accept service of his notice of appearance and his answer which defends on the merits. Steinhaus v. Enterprise Vending Mach. Co., 39 Misc. 797, 81 N. Y. Supp. 282.

800, n. 54. Rule applied to special proceedings in Martin v. Crossley, 46 Misc. 254, 91 N. Y. Supp. 712.

804, n. 13. One of several executors who are sued together may appear so as to bind all. Montgomery v. Boyd, 78 App. Div. 64, 73, 79 N. Y. Supp. 879.

805, n. 18. Littauer v. Stern, officially reported in 88 App. Div. 274, is affirmed in 177 N. Y. 233.

805, § 771. An executor sued both individually and as executor may appear by different attorneys. Roche v. O'Conner, 95 App. Div. 496, 88 N. Y. Supp. 968.

806, n. 27. Stokes v. Schildknecht, 85 App. Div. 602, 83 N. Y. Supp. 358.

816, n. 85. Rule applied to special proceedings. Martin v. Crossley, 46 Misc. 254, 91 N. Y. Supp. 712.

821, n. 8. Worthington v. Worthington, 100 App. Div. 332, 91 N. Y. Supp. 443.

825, n. 31. Williamson v. Wager, 90 App. Div. 186, 191, 86 N. Y. Supp. 684.

825, § 789. Where the fact to be stated is the result of other

facts, the resultant facts, not those furnishing evidence thereof, should be stated. Williamson v. Wager, 90 App. Div. 186, 191, 86 N. Y. Supp. 684.

826, n. 37. See, also, Ring v. Mitchell, 45 Misc. 493, 92 N. Y. Supp. 749.

828, § 792. An allegation that defendant defaulted on a contract is bad as a statement of a conclusion. Davis v. Silverman, 98 App. Div. 305, 90 N. Y. Supp. 589.

828, n. 61. Burdick v. Chesebrough, 94 App. Div. 532, 535, 88 N. Y. Supp. 13.

828, n. 63. Knowles v. City of N. Y., 176 N. Y. 430, 437. Allegations that acts were fraudulent and collusive are conclusions. Wallace v. Jones, 182 N. Y. 37.

829. The allegation "that there never was any valuable or other legal consideration" is equivalent to an allegation that there was no consideration, and is the allegation of a fact and not of a conclusion. First Nat. Bank of Towanda v. Robinson, 105 App. Div. 193, 94 N. Y. Supp. 767. So an allegation that a written instrument was "duly" assigned is sufficient. Levy v. Cohen, 103 App. Div. 195, 92 N. Y. Supp. 1074. And, in an action for malicious prosecution, an allegation that, before a magistrate, the defendant "falsely and maliciously and without just cause or provocation charged the plaintiff," etc., is a good plea of want of probable cause. Bregman v. Kress, 83 App. Div. 1, 81 N. Y. Supp. 1072. An allegation that "plaintiff is not a bona fide holder in due course of said note" is bad as a conclusion of law, as is an allegation that a note had, "before its delivery to said plaintiff, no legal inception." Rogers v. Norton, 46 Misc. 494, 95 N. Y. Supp. 49.

829, n. 65. Armstrong v. Heide, 47 Misc. 609, 94 N. Y. Supp. 434.

829, n. 71. Petty v. Emery, 96 App. Div. 35, 88 N. Y. Supp. 823; Burdick v. Chesebrough, 94 App. Div. 532, 535, 88 N. Y. Supp. 13.

829, n. 73. Wenk v. City of N. Y., 82 App. Div. 584, 81 N. Y. Supp. 583.

830, n. 88. Burdick v. Chesebrough, 94 App. Div. 532, 536, 88 N. Y. Supp. 13.

830, n. 89. Williamson v. Wager, 90 App. Div. 186, 86 N. Y. Supp. 684.

833, n. 120. Matter which can have no bearing on the issues, either on account of its manifest irrelevancy or because the law declares that it cannot be introduced, is irrelevant. Uggla v. Brokaw, 77 App. Div. 314, 79 N. Y. Supp. 244.

833, n. 121. In a suit in equity the pleader is not confined with the same degree of strictness to alleging the material facts only as in an action at law. Allegations of inducement are permissible in a complaint in equity. McGarahan v. Sheridan, 106 App. Div. 532, 94 N. Y. Supp. 708. Striking out statements of evidence, see, post, **1067**, n. 52.

837, n. 146. The complaint may state a cause of action for personal injuries as at common law and also state it according to the Employer's Liability Act. Mulligan v. Erie R. Co., 99 App. Div. 499, 91 N. Y. Supp. 60.

843, n. 190. Hasberg v. Moses is officially reported in 81 App. Div. 199.

848, n. 228. In an action for libel, a complaint not alleging any specific date of the publication of the defamatory matter is too indefinite. Cerro De Pasco Tunnel & Min. Co. v. Haggin, 106 App. Div. 388, 94 N. Y. Supp. 593.

848, n. 231. The names of those who are necessarily referred to in a pleading and their interest should appear with certainty. In the absence of an averment that their names are unknown, parties referred to as "others" must be made definite and certain. Smith v. Irvin, 45 Misc. 262, 92 N. Y. Supp. 170.

851, n. 246. Seydel v. Corporation Liquidating Co., 46 Misc. 576, 92 N. Y. Supp. 225.

851, n. 251. Ziemer v. Crucible Steel Co., 99 App. Div. 169, 90 N. Y. Supp. 962.

852, n. 256. Vandegrift v. Bertron, 83 App. Div. 548, 82 N. Y. Supp. 153.

853, n. 268. Guarino v. Fireman's Ins. Co., 44 Misc. 218, 88 N. Y. Supp. 1044.

854, n. 276. Failure to object, before the opening of the trial, in an action on a policy, to the plaintiff's failure to attach a copy of the policy to the complaint, where the answer

admitted the making of the policy as alleged in the complaint, and where defendant has one form of policy and it is the duty of its secretary to keep a record of all of its policies of insurance, precludes an attack on the sufficiency of the complaint. Nugent v. Rensselaer County Mut. Fire Ins. Co., 106 App. Div. 308, 94 N. Y. Supp. 605.

855, n. 286. It is unnecessary, in the complaint, to allege in detail the facts essential to connect plaintiff with the libel. Corr v. Sun Print. & Pub. Ass'n, 177 N. Y. 131, 135; Bianchi v. Star Co., 46 Misc. 486, 95 N. Y. Supp. 28.

857, § 800. Cited by Spencer, J., in Stone v. Hudson Valley R. Co., 47 Misc. 5, 95 N. Y. Supp. 220, which held that an action to recover assessments against a member of a casualty association was not an action on an account.

858, n. 299. Where the action is deemed to be one in which defendant is not entitled as of right to demand a bill of particulars or copy of account, plaintiff's attorney may move to strike out the demand, in order to relieve himself from the necessity of determining, at his peril, whether the case is one in which a demand is a matter of right. Main v. Pender, 88 App. Div. 237, 85 N. Y. Supp. 428. It is immaterial that the motion is not made and heard within ten days after the service of the demand. Stone v. Hudson Valley R. Co., 47 Misc. 5, 95 N. Y. Supp. 220.

859, § 802. A receipt and statement of amount due, signed by plaintiff, is not sufficient. Beirne v. Sanderson, 83 App. Div. 62, 82 N. Y. Supp. 493.

862, n. 326. This clause is stricken out by Laws 1904, c. 500, and the following sentence is substituted: "Upon application, in any case, the court, or a judge authorized to make an order in the action, may, upon notice, direct a bill of particulars of the claim of either party to be delivered to the adverse party, and in case of default the court shall preclude him from giving evidence of the part or parts of his affirmative allegation of which particulars have not been delivered."

862, n. 328. Swan v. Swan, 44 Misc. 163, 89 N. Y. Supp. 794.

863. A bill of particulars is not necessary, it seems, to enable the defendant to answer, where the defendant has or has not

knowledge sufficient to admit or deny, since he may deny knowledge or information sufficient to form a belief. Hicks v. Eggleston, 95 App. Div. 162, 88 N. Y. Supp. 528. A bill will not be ordered, on motion of defendant, where the conceded facts entitle plaintiff to an accounting by the defendant. Heidenreich v. Hirsh, 85 App. Div. 319, 83 N. Y. Supp. 366. Particulars of the names of persons whom plaintiff procured to purchase defendant's goods, on which sales the plaintiff claims to be entitled to commissions, was held properly awarded before answer in Zeigler v. Garvin, 84 App. Div. 281, 82 N. Y. Supp. 769. Particulars of an affirmative defense may be ordered to the same extent as the particulars of the cause of action. Spitz v. Heinze, 77 App. Div. 317, 79 N. Y. Supp. 187. The fact that the moving party is an executor was taken into consideration in Oatman v. Watrous, 99 App. Div. 254, 90 N. Y. Supp. 940.

863, n. 331. Kavanaugh v. Commonwealth Trust Co., 45 Misc. 201, 91 N. Y. Supp. 967.

863, n. 332. American Transfer Co. v. George Borgfeldt & Co., 99 App. Div. 470, 91 N. Y. Supp. 209; Goivans v. Jobbins, 90 App. Div. 429, 86 N. Y. Supp. 312; Belasco v. Klaw, 96 App. Div. 268, 89 N. Y. Supp. 208; Neuwelt v. Consolidated Gas Co., 94 App. Div. 312, 87 N. Y. Supp. 1003. Where it appears that the facts are as much within the knowledge of the party demanding as they can be on the part of the party from whom the demand is made, and that the real object of the bill of particulars is to limit the party furnishing the same to the exact allegations of such bill of particulars, the appellate court will not interfere to control the discretion of the court below in denying the motion. Messer v. Aaron, 101 App. Div. 169, 91 N. Y. Supp. 921.

864, n. 337. Slingerland v. Corwin, 105 App. Div. 310, 93 N. Y. Supp. 953.

864, n. 338. It is not the duty of a party to a litigation to disclose to his adversary the names of the witnesses he will call in support of his allegations, unless this is an incident to the furnishing of information in reference to an issuable fact. Knipe v. Brooklyn Daily Eagle, 101 App. Div. 43, 91 N. Y. Supp. 872. In an action for libel where defendant pleaded the truth of the

alleged libelous statements, founded on statements of residents to a reporter of defendant, a bill of particulars containing the names and addresses of the reporter and his informants is properly denied. Id.

864, n. 342. The same rule applies where denials of matters which plaintiff must prove are incorporated into a counterclaim of which plaintiff demands particulars. O'Rourke v. United States Mortg. & Trust Co., 95 App. Div. 518, 88 N. Y. Supp. 926; Reitmayer v. Crombie, 94 App. Div. 303, 87 N. Y. Supp. 973. Contra, Hopper v. Weber, 84 App. Div. 266, 82 N. Y. Supp. 567. These cases were all actions on contract where defendants counterclaimed for damages for breach of the contract, and plaintiff sought to compel defendant to furnish the particulars as to the portions of the contract broken. So where a denial is specific, particulars will not be ordered, as where the answer sets up certain particulars in which plaintiff failed to comply with the contract sued on. Barretto v. Rothschild, 93 App. Div. 211, 87 N. Y. Supp. 553. Where a recovery is sought upon the theory of a contract which has been performed, and wherein the answer denies full performance, a defendant is not required to give the particulars in which the plaintiff has failed to perform; for the reason that such knowledge is as much within the possession of the plaintiff as of the defendant, and before the former can recover it will be necessary to prove full performance. Reitmayer v. Crombie, 94 App. Div. 303, 87 N. Y. Supp. 973; O'Rourke v. United States Mortg. & Trust Co., 95 App. Div. 518, 88 N. Y. Supp. 926. But where defendant denied performance, and alleged by way of offset, without counterclaim, that he had expended moneys for labor and materials in completing the contract, etc., such allegations being competent in support of the defense of nonperformance, plaintiff was entitled to particulars with reference thereto. Brandt v. City of N. Y., 99 App. Div. 260, 90 N. Y. Supp. 929. That the answer only contains denials is no reason for refusing to compel "plaintiff" to furnish a bill of particulars. Newman v. West, 101 App. Div. 288, 91 N. Y. Supp. 740.

865, n. 344. In an action for fraud, unless the defendant denies the fraud charged in the complaint, a bill of particulars of

the plaintiff's claim should not be ordered. Newman v. West, 101 App. Div. 288, 91 N. Y. Supp. 740.

865, § 808. Bill of particulars as to payment set up by the answer may be ordered. Lynch v. Dorsey, 98 App. Div. 163, 90 N. Y. Supp. 741. Contra, Swan v. Swan, 44 Misc. 163, 89 N. Y. Supp. 794.

865, n. 348. But see Spitz v. Heinze, 77 App. Div. 317, 79 N. Y. Supp. 187.

866. Bill held properly ordered in action to recover damages for injuries to personal property sustained by the plaintiff in consequence of the negligent manner in which the defendant maintained and repaired the roof of certain premises, of which the defendant was the lessor and the plaintiff the lessee. M. J. Taylor & Co. v. Asiel, 93 N. Y. Supp. 377. Bill refused as to names and addresses of dealers whose trade in plaintiff's goods was lost by defendant's contract for exclusive sale of particular goods. Armstrong v. Heide, 45 Misc. 344, 90 N. Y. Supp. 372. In Treadwell v. Greene, 87 App. Div. 289, 84 N. Y. Supp. 354, which was an action to recover for services, a bill was ordered as to whether certain contracts were oral or written, their date, and whether made personally by defendant or through an agent.

867, n. 362. Dangerous condition of stairway. Robinson v. Stewart, 84 App. Div. 594, 82 N. Y. Supp. 928. Defective condition of window. Burke v. Frenkel, 95 App. Div. 89, 88 N. Y. Supp. 517. But in Neuwelt v. Consolidated Gas Co., 94 App. Div. 312, 87 N. Y. Supp. 1003, it was held improper to require plaintiff to furnish a bill of particulars specifying the particular act or acts of negligence on the part of defendant gas company which the plaintiff claimed had caused the explosion.

867, n. 363. O'Neill v. Interurban St. R. Co., 87 App. Div. 557, 84 N. Y. Supp. 505. Particulars as to medical expense may be ordered as may the particulars as to the time lost by plaintiff and the wages which he was prevented from earning. Ziadi v. Interurban St. R. Co., 97 App. Div. 137, 89 N. Y. Supp. 606. But particulars of injuries not permanent cannot be required. Lachenbruch v. Cushman, 87 N. Y. Supp. 476.

868, n. 364. Names of defendant's witnesses will not be re-

quired. Knipe v. Brooklyn Daily Eagle, 101 App. Div. 43, 91 N. Y. Supp. 872.

869, n. 371. The names of the "duly authorized agent or agents" of the plaintiff to whom fraudulent statements were made, and the names of the officers of a corporation alleged to have conspired against plaintiff, may be obtained by an individual defendant. Riker v. Erlanger, 87 App. Div. 137, 84 N. Y. Supp. 69.

869, n. 372. If the defendant has been guilty of a fraud, it does not need, in order to properly defend the action, to be informed, in advance of the trial, what information the plaintiff has on that subject. It is not the office of a bill of particulars to inform an adversary, in advance of the trial, upon what his opponent relies. American Transfer Co. v. George Borgfeldt & Co., 99 App. Div. 470, 91 N. Y. Supp. 209.

869, n. 374. Slingerland v. Corwin, 105 App. Div. 310, 93 N. Y. Supp. 953.

870, n. 378. Kirkland v. Kirkland, 39 Misc. 423, 80 N. Y. Supp. 21.

870, n. 381. The 1904 amendment of section 531 of the Code expressly requires notice of the motion. It changes the former practice by permitting the application to be made to the court "or to a judge authorized to make an order in the action."

870, § 809. While the usual practice is to serve a demand for a bill of particulars to obtain costs of the motion if the demand is not complied with, yet it seems that a formal demand is not necessary for that purpose, since it is held in Kelly v. United Traction Co., 88 App. Div. 234, 85 N. Y. Supp. 433, that such a demand will be stricken out on motion inasmuch as a party can demand, as of right, only a copy of the items alleged in an account.

871. If a bill is served before a motion is made to compel the delivery of a bill, and it is retained, the motion should be for a further bill. Schlesinger v. Thalmessinger, 93 N. Y. Supp. 381.

871, n. 382. Practice of moving in the alternative condemned in Kavanaugh v. Commonwealth Trust Co., 45 Misc. 201, 91 N. Y. Supp. 967.

871, n. 385. Kirkland v. Kirkland, 39 Misc. 423, 80 N. Y. Supp. 21.

871, n. 389. Toomey v. Whitney is officially reported in 81 App. Div. 441.

872, nn. 391, 392. It would seem that where defendant has not sufficient knowledge to either admit or deny allegations of the complaint, it is necessary to answer by denying any knowledge or information sufficient to form a belief before moving for a bill of particulars (American Credit Indem. Co. v. Bondy, 17 App. Div. 328, 45 N. Y. Supp. 267; followed in Hicks v. Eggleston, 95 App. Div. 162, 88 N. Y. Supp. 528), but it is submitted that these cases are not sufficiently broad to prevent, in every *other case, the granting of a bill of particulars before the party serves his pleading, i. e., before defendant serves his answer if he is the moving party, or before plaintiff serves his reply if he is the moving party. In other words, the order, where made before the moving party pleads, cannot be sustained on the ground that it is necessary to prepare for trial. Hicks v. Eggleston, 95 App. Div. 162, 88 N. Y. Supp. 528. Where "the defendant has, in his moving papers, sworn to merits, a bill of particulars is unnecessary in order to enable him to plead. 1 Nichols' Pr. 863, and cases there cited." Kavanaugh v. Commonwealth Trust Co., 45 Misc. 201, 91 N. Y. Supp. 967. No bill of particulars concerning a counterclaim, to prepare for trial, will be ordered until a reply has been served. Fidelity Glass Co. v. Thatcher Mfg. Co., 88 App. Div. 287, 85 N. Y. Supp. 8. "In American Credit Indemnity Co. v. Bondy, 17 App. Div. 328, 45 N. Y. Supp. 267, it was held by the appellate division, in the first department, that, where no answer has been served, a motion by the defendant for a bill of particulars upon the ground that it was necessary for his defense, must be denied, as it cannot be said that a defense will be made until an issue is raised by the service of an answer; and it was further held that such an order could not be granted to enable the defendant to answer where he was wholly ignorant of the particulars of the plaintiff's claim, inasmuch as the Code of Civil Procedure (section 500) permits him to deny any knowledge or information sufficient to form a belief as to the allegations of the complaint

in reference to it. That case was followed by this court on both points in Hicks v. Eggleston, 95 App. Div. 162, 88 N. Y. Supp. 528, and must be assumed to state the rule applicable to the situation in this department." Schultz v. Rubsam, 93 N. Y. Supp. 334.

872, n. 393. Gowans v. Jobbins, 90 App. Div. 429, 432, 86 N. Y. Supp. 312.

873, n. 397. Florsheim v. Musical Courier Co., 103 App. Div. 388, 93 N. Y. Supp. 41.

874. If verified pleadings are a part of the moving papers, denials therein are to be treated as if in the moving affidavit. Newman v. West, 101 App. Div. 288, 91 N. Y. Supp. 740.

874, n. 408. Toomey v. Whitney is officially reported in 81 App. Div. 441.

875. Form of affidavit. Propriety of motion before pleading, see ante **872**, nn. 391, 392.

875, n. 412. Ziadi v. Interurban St. R. Co., 97 App. Div. 137, 89 N. Y. Supp. 606.

876, n. 418. Earle v. Earle, 79 App. Div. 631 (mem.), 79 N. Y. Supp. 613.

876, n. 424. D'Anglemont v. Fischer, 87 N. Y. Supp. 505. The 1904 amendment of section 531 of the Code requires the inclusion of such clauses in the order. It seems that the provision is mandatory and exclusive so that the order, at the present time, can impose no other penalty for its disobedience. This clause should now, it seems, be included in every order granting an application. Oatman v. Watrous, 99 App. Div. 254, 90 N. Y. Supp. 940.

877. The order should not require the annexation of documentary evidence. Pruyn v. Ecuadorian Ass'n, 94 App. Div. 195, 87 N. Y. Supp. 970. An order allowing particulars to be served after a default should not provide for a production of books and papers. Romer v. Kensico Cemetery, 79 App. Div. 100, 80 N. Y. Supp. 38.

879, n. 445. Where the bill is insufficient, it may be returned with a notice of the reason therefor, so as to put the burden of making a motion to test its sufficiency on the party furnishing the bill. The party served with the bill has his choice to

return the bill furnished or to demand a further bill. Faller v. Ranger, 44 Misc. 424, 90 N. Y. Supp. 55. In this case, the court discusses the practice as follows: "If the bill of particulars is returned, then the party serving it, taking the risk of its sufficiency, may do nothing, and wait until the question is raised upon the trial. This risk, however, we do not think he should be bound to assume, or that it is good practice to assume it, because it will necessarily place him at a disadvantage in having to go to trial, assuming the risk that the bill of particulars, as served, complied with the order; the defendant, on the other hand, assuming no risk by returning it, even if it does comply. * * * If the bill as served is deemed defective or insufficient, the one on whom it is served can move for a further bill of particulars, and this is seemingly the more regular and orderly practice. Should he, however, elect to return it, then the party serving it should have the right to compel him to accept it, and on such a motion the question of whether or not it complies with the order should be decided. In either of these events the question is determined in advance of the trial, and such practice commends itself, because it tends to avoid delay and confusion at the outset of a trial, and saves the trial judge from being bothered by questions of practice and sufficiency of bills of particulars at a time when he is ready to take up and dispose of the controversy on its merits." Faller v. Ranger, 99 App. Div. 374, 91 N. Y. Supp. 205.

880, n. 455. Defective averments in the answer, as to fraud, cannot be aided by statements in the bill of particulars. The rule is that a bill of particulars cannot be resorted to to enlarge the grounds of recovery, to change the cause of action, or to enlarge the defense set up in the answer. Beadleston & Woerz v. Furrer, 102 App. Div. 544, 92 N. Y. Supp. 879.

880, n. 456. Lester v. Clarke, 40 Misc. 688, 83 N. Y. Supp. 168.

881, n. 463. Failure to demand a copy of the complaint within twenty days precludes a subsequent motion to require plaintiff's attorney to serve a copy. The practice is to apply to the court to open the default and be permitted to serve a de-

mand. Stokes v. Schildknecht, 85 App. Div. 602, 83 N. Y. Supp. 358.

882, n. 475. Interlineation in the original, not in the copy served, is to be disregarded. Guarino v. Fireman's Ins. Co., 44 Misc. 218, 88 N. Y. Supp. 1044.

885, § 819. After a case has been set down for trial, it is proper to refuse to allow a demurrer to be substituted for the answer where the question sought to be raised by the demurrer can be presented under the answer. Le Brantz v. Campbell, 89 App. Div. 583, 85 N. Y. Supp. 654. After a reversal, on appeal, of an order striking certain allegations from the complaint, defendant should be granted leave to withdraw his answer. Brown v. Fish, 40 Misc. 573, 82 N. Y. Supp. 939.

887, nn. 503–505. By Laws 1904, c. 518, which amended section 1680 of the Code, the complaint must be verified to enable plaintiff to file a lis pendens.

891, n. 545. Eastham v. New York State Tel. Co., 86 App. Div. 562, 83 N. Y. Supp. 1019.

896, n. 585. Henry v. Brooklyn Heights R. Co., 43 Misc. 589, 89 N. Y. Supp. 525.

896, n. 587. Of course, if the answer denies knowledge or information sufficient to form a belief, the attorney may verify it without setting forth the grounds of his belief. American Audit Co. v. Industrial Federation, 84 App. Div. 304, 82 N. Y. Supp. 642.

898, n. 597. Morris v. Fowler, 99 App. Div. 245, 90 N. Y. Supp. 918.

901, n. 627. When pleading is returned in twenty-four hours, see Sweeney v. O'Dwyer, 45 Misc. 43, 90 N. Y. Supp. 806.

906, n. 652. Williamson v. Wager, 90 App. Div. 186, 86 N. Y. Supp. 684.

908, n. 669. Goldstein v. Michelson, 45 Misc. 601, 91 N. Y. Supp. 33.

910, n. 676. Driscoll v. Brooklyn Union El. R. Co., 95 App. Div. 146, 88 N. Y. Supp. 745; Fiebiger v. Forbes, 43 Misc. 612, 88 N. Y. Supp. 284.

913, n. 708. Evidence in contradiction to admissions in the

pleadings, though admitted without objection, must be disregarded. Pennacchio v. Greco, 107 App. Div. 225, 94 N. Y. Supp. 1061.

915, n. 720. Tautphoeus v. Harbor & S. Bldg. & Sav. Ass'n, 96 App. Div. 23, 88 N. Y. Supp. 709.

915, n. 723. See, also, Fuller Buggy Co. v. Waldron, 94 N. Y. Supp. 1017.

915, n. 724. When return is made in twenty-four hours, see Sweeney v. O'Dwyer, 45 Misc. 43, 90 N. Y. Supp. 806.

918, n. 2. The second subdivision of this Code provision was amended by Laws 1904, c. 500, so as to require a "clear, precise, and unequivocal" statement of the facts, and omitted the clause "without unnecessary repetition." By Laws 1905, c. 431, it was again changed so as to make it read precisely as before the amendment of 1904.

919, nn. 6, 7. There is a well-recognized exception to this rule in that where it appears that the county named in the complaint as the place of trial is different from that named in the summons, and such act was merely an inadvertence, then the place of trial is not changed, provided the plaintiff's attorney moves promptly in the matter to correct the error, so as not to permit his adversary to presume the change was intentional. Goldstein v. Marx, 73 App. Div. 545, 77 N. Y. Supp. 956; Tolhurst v. Howard, 94 App. Div. 439, 88 N. Y. Supp. 235; Bell v. Polymero, 99 App. Div. 303, 90 N. Y. Supp. 920.

921, n. 24. Willets v. Haines, 96 App. Div. 5, 88 N. Y. Supp. 1018; Newland v. Zodikow, 39 Misc. 541, 80 N. Y. Supp. 375.

923. A complaint in a county court, in an action for money only, must show the residence of defendant within the county. Perlman v. Gunn, 41 Misc. 166, 83 N. Y. Supp. 986.

923, n. 40. A cestui que trust can maintain an action in relation to the trust property only after the trustee has refused to sue, and the complaint must show such refusal. Woolf v. Barnes, 46 Misc. 169, 93 N. Y. Supp. 219.

924. A general statement that there is no adequate remedy at law is not essential in a complaint in a suit in equity where it is manifest from the facts alleged that an action at law would give but an inadequate and imperfect remedy to the party ag-

grieved. International Paper Co. v. Hudson River Water Power Co., 92 App. Div. 56, 68, 86 N. Y. Supp. 736. Where, in an action in equity, relief is sought to be obtained and the amounts to be paid by either party to the other are uncertain and subject to an accounting between the parties, it is enough to offer in the complaint to pay or perform whatever obligations rest on the plaintiff. International Paper Co. v. Hudson River Water Power Co., 92 App. Div. 56, 70, 86 N. Y Supp. 736. The complaint, in an action by a foreign corporation on a New York contract, must allege that it has obtained a certificate from the state of authority to do business. Welsbach Co. v. Norwich Gas & Electric Co., 96 App. Div. 52, 89 N. Y. Supp. 284.

925, n. 62. In an action for goods sold, the complaint need not allege a new promise in writing to pay the debt which had been discharged in bankruptcy. Gruenberg v. Treanor, 40 Misc. 232, 81 N. Y. Supp. 675. But nonpayment must be alleged. Bacon v. Chapman, 85 App. Div. 309, 82 N. Y. Supp. 545. The following rules are laid down in Conklin v. Weatherwax, 181 N. Y. 258, 268, as to pleading nonpayment:

"1. In an action upon contract for the payment of money only, where the complaint does not allege a balance due over and above all payments made, it is sufficient for the plaintiff to allege and prove a breach of the obligation by the nonpayment thereof when it matured, as the presumption of nonpayment continues until met by the allegation and proof of payment.

"2. When the complaint sets forth a balance in excess of all payments, owing to the structure of the pleading, it is necessary for the plaintiff to prove the allegation as made, and this leaves the amount of the payments open to the defendant under a general denial.

"3. When the action is not upon contract for the payment of money, but is upon an obligation created by operation of law, or is for the enforcement of a lien where nonpayment of the amount secured is part of the cause of action, it is necessary both to allege and prove the fact of nonpayment."

925, n. 63. Plaintiff need not plead an exception taking the case out of the statute of limitations where the cause of action

set forth is not necessarily barred. Metz v. Metz, 45 Misc. 338, 90 N. Y. Supp. 340.

926, n. 70. A distinctly numbered paragraph may be incorporated in the statement of a subsequent cause of action, by reference thereto as such. Bigelow v. Drummond, 98 App. Div. 499, 90 N. Y. Supp. 913, which reverses 42 Misc. 617, 87 N. Y. Supp. 581, which held that it is not sufficient to insert a statement that plaintiffs "repeat and reallege all the statements contained in paragraphs I. and III. of the first cause of action, but as relating to the omissions of the defendant hereinafter mentioned.

926, n. 71. A complaint is not demurrable because of the failure to repeat in each cause of action the preliminary allegations setting forth the capacity of plaintiff to sue. Bigelow v. Drummond, 98 App. Div. 499, 90 N. Y. Supp. 913.

928, n. 83. Kuntz v. Schnugg, 99 App. Div. 191, 90 N. Y. Supp. 933.

928, n. 92. Frick v. Freudenthal, 45 Misc. 348, 90 N. Y. Supp. 344.

937. The answer must be served within twenty days after service of the complaint—not twenty days after date of admission of service of the complaint which was antedated by mistake. Tolhurst v. Howard, 94 App. Div. 439, 88 N. Y. Supp. 235.

937, n. 6. Van Zandt v. Van Zandt is followed in Sanders v. People's Co-Op. Ice Co., 44 Misc. 171, 89 N. Y. Supp. 785.

939. An order extending the time to answer remains in full force until the order vacating it is actually signed and entered, so that an answer served after the vacating order is granted but before it is signed and entered is served in time. De Pallandt v. Flynn, 93 N. Y. Supp. 678.

940, nn. 25, 26. Sherman v. McCarthy, 90 App. Div. 542, 85 N. Y. Supp. 727.

941, n. 31. The second subdivision of this Code section was amended by Laws 1904, c. 500, by leaving out the words "without repetition," and by changing the clause "in ordinary and concise language" to a "clear, precise, and unequivocal statement." By Laws 1905, c. 431, it was again changed so as to read precisely as before the 1904 amendment.

943, n. 44. But a denial is not nugatory because preceded by the words "for a second (or third or fourth) further, separate, and distinct defense," etc. Hopkins v. Meyer, 76 App. Div. 365, 78 N. Y. Supp. 459.

943, nn. 44–46. See, also, post, **959**, n. 171.

943, n. 45. Blumenfield v. Stine, 42 Misc. 411, 87 N. Y. Supp. 81.

946, n. 64. Landesman v. Hauser, 45 Misc. 603, 91 N. Y. Supp. 6.

946, n. 69. Weil v. Unique Electric Device Co., 39 Misc. 527, 80 N. Y. Supp. 484. In an action by an officer to recover salary, any fact tending to show that he was not legally an officer is available under a general denial. Murtagh v. City of N. Y., 106 App. Div. 98, 94 N. Y. Supp. 308.

946, n. 70. In an action for conversion, defendant is entitled to show title in a stranger under a general denial. Ten Eyck v. Keller, 99 App. Div. 106, 91 N. Y. Supp. 169.

947, nn. 75, 76. But where the illegality does not appear on the face of the complaint or necessarily from plaintiff's evidence, it cannot be taken advantage of under a general denial. Lee v. Lee, 40 Misc. 251, 253, 81 N. Y. Supp. 986. See, also, Coverly v. Terminal Warehouse Co., 85 App. Div. 488, 83 N. Y. Supp. 369, as to sufficiency of plea that contract is against public policy.

948. A denial of the allegations of the complaint "as alleged" is bad as a negative pregnant where not denying the substance of the complaint. Hutchinson v. Bien, 104 App. Div. 214, 46 Misc. 302, 93 N. Y. Supp. 189, 216. But in an action on a contract, a denial that plaintiff has performed all the conditions precedent is not bad as a negative pregnant, since the failure to perform any one condition precedent would be fatal. Electric Equipment Co. v. Feuerlicht, 90 N. Y. Supp. 467. A negative pregnant may be disregarded on appeal. Frees v. Blyth, 99 App. Div. 541, 91 N. Y. Supp. 103.

951. Denial of "knowledge or information" instead of "any knowledge or information" is sufficient. Hidden v. Godfrey, 88 App. Div. 496, 85 N. Y. Supp. 197. But a denial of "information sufficient to form a belief," etc., without referring to

"knowledge," is insufficient. Meuer v. Phenix Nat. Bank, 87 App. Div. 281, 84 N. Y. Supp. 321.

953, n. 121. Hillyer v. Le Roy, 84 App. Div. 129, 82 N. Y. Supp. 80. But see Ehrenfried v. Lackawanna Iron & Steel Co., 89 App. Div. 130, 85 N. Y. Supp. 57, which held, in a negligence case, that where all the evidence establishing assumption of risk had been introduced by plaintiff, such defense was available to defendant though he had not pleaded it in his answer.

953, n. 124. Schultz v. Greenwood Cemetry, 46 Misc. 299, 93 N. Y. Supp. 180.

954. In an equitable suit defendant may set up in his answer matter which occurred after the commencement of the action and the service of the complaint. Wormser v. Metropolitan St. R. Co., 98 App. Div. 29, 33, 90 N. Y. Supp. 714. Material facts occurring after the commencement of the action but before the filing of the answer may be set up in the answer without the aid of a supplemental answer. Burke v. Rhoads, 39 Misc. 208, 79 N. Y. Supp. 407. That the facts stated in the complaint or counterclaim do not constitute a cause of action, while a ground of demurrer, cannot be set up as a defense in the answer or reply. Schlesinger v. Thalmessinger, 92 N. Y. Supp. 575. Proof of waiver of a breach of contract is not admissible under a general denial, but the waiver must be pleaded as new matter. Grant v. Pratt & Lambert, 87 App. Div. 490, 494, 84 N. Y. Supp. 983. That the defendant in action for goods sold and delivered is a married woman and that the goods were necessaries purchased for the family in new matter. Minners v. Smith, 40 Misc. 648, 83 N. Y. Supp. 117. That the plaintiff, a foreign corporation, has no certificate to do business in New York, is new matter. International Society v. Dennis, 76 App. Div. 327, 78 N. Y. Supp. 497; Lehigh & N. E. R. Co v. American Bonding & Trust Co., 40 Misc. 698, 83 N. Y. Supp. 191.

954, n. 129. Sufficiency of plea of tender, see Schieck v. Donohue, 77 App. Div. 321, 79 N. Y. Supp. 233.

954, n. 130. National Radiater Co. v. Hull, 79 App. Div. 109, 79 N. Y. Supp. 519.

954, n. 135. Rogers v. T. H. Simonson & Son Co., 45 Misc. 323, 90 N. Y. Supp. 298; Forbes v. Wheeler, 39 Misc. 538, 80 N. Y. Supp. 373.

954, n. 138. Cheever v. British-American Ins. Co., 86 App. Div. 333, 83 N. Y. Supp. 728.

955, n. 142. See, ante, **947**, nn. 75, 76.

955, n. 143–146. The statute of frauds may be raised by answer though the invalidity of the contract appears on the face of the complaint so as to make the complaint demurrable. Seamans v. Barentsen, 180 N. Y. 333.

955, n. 143. New York Fireproof Tenement Ass'n v. Stanley, 105 App. Div. 432, 94 N. Y. Supp. 160; Banta v. Banta, 84 App. Div. 138, 82 N. Y. Supp. 113; Seamans v. Barentsen, 78 App. Div. 36, 79 N. Y. Supp. 212.

955, last sentence. But where the plaintiff pleads a written contract, the statute need not be pleaded to be available where the plaintiff proves an oral contract. Brauer v. Oceanic Steam Nav. Co., 178 N. Y. 339, followed in Levin v. Dietz, 94 N. Y. Supp. 419. So where the complaint states a cause of action on an oral contract, which, by its terms as averred, does not fall within the statute of frauds, it is not necessary to plead the statute as an affirmative defense in order to take the objection on the trial that the contract actually proved is within the statute. Fanger v. Caspacy, 87 App. Div. 417, 84 N. Y. Supp. 410.

957, n. 157. Adams v. Slingerland is officially reported in 87 App. Div. 312.

957, n. 158. Bauer v. Parker, 82 App. Div. 289, 81 N. Y. Supp. 995.

957, n. 160. Le Vie v. Fenton, 39 Misc. 265, 70 N. Y. Supp. 496; Rooney v. Bodkin, 93 App. Div. 431, 87 N. Y. Supp. 800. This rule does not apply where the absence of an adequate remedy at law is an essential part of the plaintiff's case. Everett v. De Fontaine, 78 App. Div. 219, 79 N. Y. Supp. 692.

958, § 866. An answer in a foreclosure suit alleging that no payments of interest or principal have been made to apply on the bond and mortgage since a certain date, "and more than twenty years have elapsed since the last payment was made, and said bond and mortgage are no longer a legal or enforcible claim under the statutes made and provided," sufficiently pleads limitations. Nickell v. Tracy, 100 App. Div. 80, 91 N. Y. Supp. 287. So a plea of the statute of limitations which alleges that the services sued for were rendered more than six years

prior to the commencement of the action, is sufficient, since it will be presumed that compensation therefor was immediately due on their performance. Bacon v. Chapman, 85 App. Div. 309, 82 N. Y. Supp. 545. However, a plea "that the statutory period in which to begin such an action as is here brought, to-wit, ten years, has long since expired, and that this action is consequently outlawed," is insufficient, since not averring that ten years have expired before the commencement of the action since the cause of action accrued. Schrieber v. Goldsmith, 39 Misc. 381, 79 N. Y. Supp. 846. So the alleging that the particular cause of action set forth in the complaint did not accrue within six years, instead of pleading generally that whatever cause of action the plaintiff may have had did not accrue within six years, is insufficient. Gray Lithograph Co. v. American Watchman's Time Detector Co., 44 Misc. 206, 88 N. Y. Supp. 857.

958, nn. 164–167. That a defense is not so designated, where separate and distinct and preceded by the words "defendant further answering said complaint," is sufficient. Eells v. Dumary, 84 App. Div. 105, 82 N. Y. Supp. 531.

958, nn. 168–170. While the rules laid down in the text are supported by the authorities cited, it is feared that the erroneous impression may be gathered therefrom that a hypothetical pleading is always good, which is far from true. The general rule, though there is much conflict in the opinions, seems to be that a hypothetical statement is usually subject to a motion to make more definite and certain (see vol. 1, p. 845), though not necessarily so (id. and see cases cited on pp. 958 and 959), but is not demurrable (see, post, 1003, n. 93). That hypothetical defenses are bad, see Saleeby v. Central R. of N. J., 40 Misc. 269, 81 N. Y. Supp. 903.

959. In an action to recover damages for breach of contract, the defense must not only confess, but also avoid or bar. If it does not fully avoid or bar, the mere allegation of the answer of a contract of other terms or of a different character has no effect. Barnard v. Lawyers' Title Ins. Co., 45 Misc. 577, 91 N. Y. Supp. 41.

959, n. 171. Sanford v. Rhoads, 39 Misc. 548, 80 N. Y. Supp.

404; Jaeger v. City of N. Y., 39 Misc. 543, 80 N. Y. Supp. 356; Carpenter v. Mergert, 39 Misc. 634, 80 N. Y. Supp. 615; Uggla v. Brokaw, 77 App. Div. 310, 79 N. Y. Supp. 244; Eells v. Dumary, 84 App. Div. 105, 82 N. Y. Supp. 531; Leonorovitz v. Ott, 40 Misc. 551, 82 N. Y. Supp. 880. But in Rogers v. Morton, 46 Misc. 494, 95 N. Y. Supp. 49, it is held that specific denials in a defense are not necessarily surplusage or immaterial, since it may be necessary to deny specific allegations of the complaint which would otherwise be admitted.

959, n. 172. Wormser v. Metropolitan St. R. Co., 98 App. Div. 29, 90 N. Y. Supp. 714.

960, n. 174. Hawkins v. Mapes-Reeve Const. Co., 178 N. Y. 236, 241, which affirms 82 App. Div. 72, 80, 81 N. Y. Supp. 794.

960, n. 178. It must show that the former suit was pending when the second action was commenced. Hirsh v. Manhattan R. Co., 84 App. Div. 374, 377, 82 N. Y. Supp. 754.

960, n. 179. Wenk v. City of N. Y. is officially reported in 82 App. Div. 584.

961, n. 182. Partial defenses are not limited to the actions enumerated. Gabay v. Doane, 77 App. Div. 413, 79 N. Y. Supp. 312. This Code section was not intended to apply to an action in equity asking for discretionary relief, where a defendant sets up facts which he will ask the court to consider in determining the relief to be granted. Straus v. American Publishers' Ass'n, 103 App. Div. 277, 92 N. Y. Supp. 1052.

961, n. 184. Mott v. De Nisco, 106 App. Div. 154, 94 N. Y. Supp. 380.

962. In an action to recover for services, the defense was that it had been agreed that a sum to be fixed by defendant should be received in satisfaction of the services, but that plaintiff had refused to accept the sum as fixed, is a partial defense, where there was no tender nor was the money brought into court. Butler v. General Acc. Assur. Corp., 103 App. Div. 273, 92 N. Y. Supp. 1025. A separate defense, in an equitable suit alleging facts which existed at the time the pleading was made, though interposed after a determination on appeal of a demurrer to the complaint, need not be pleaded as a partial defense. Straus v. American Publishers' Ass'n, 45 Misc. 251, 92 N. Y. Supp. 153.

965, n. 210. Mott v. De Nisco, 94 N. Y. Supp. 380; Singer v. Abrams, 47 Misc. 360, 94 N. Y. Supp. 7; Barnard v. Lawyers' Title Ins. Co., 45 Misc. 577, 91 N. Y. Supp. 41.

968. Calling a counterclaim a set-off does not make it so. S. Liebmann's Sons Brewing Co. v. De Nicolo, 91 N. Y. Supp. 791.

971. A possible but unestablished liability which is unliquidated in amount cannot be set up against a liquidated legal claim that is due and payable. Dunn v. Uvalde Asphalt Pav. Co., 175 N. Y. 214.

972, n. 245. But this rule does not prevent defendant from denying its liability or default on a contract and then set up as a counterclaim the default of the plaintiff. Hudson River P. T. Co. v. United Traction Co., 43 Misc. 205.

972, n. 248. Williams v. Clarke, 82 App. Div. 199, 81 N. Y. Supp. 381. See, also, Hudson River P. T. Co. v. United Traction Co., 98 App. Div. 568, 91 N. Y. Supp. 179.

974, n. 260. In an action against a firm, one partner cannot set up a personal claim as a counterclaim. Hunter v. Booth, 84 App. Div. 585, 82 N. Y. Supp. 1000.

975. In an action for dower in land conveyed by the husband by a deed in which the wife did not join, a counterclaim cannot be set up for damages for the amount of such dower interest, though the wife is the sole legatee and devisee. Burnett v. Burnett, 86 App. Div. 386, 83 N. Y. Supp. 760.

976, n. 268. Lundine v. Callaghan, 82 App. Div. 621, 626, 81 N. Y. Supp. 1052; George A. Fuller Co. v. Manhattan Const. Co., 44 Misc. 219, 88 N. Y. Supp. 1049. In an action on notes given in payment for stock of a corporation, defendant cannot set up a counterclaim for damages from misrepresentations as to the financial condition of the corporation. Story v. Richardson, 91 App. Div. 381, 86 N. Y. Supp. 843.

977, n. 275. In an action ex delicto to recover for the conversion of rents collected by defendant as the agent of plaintiff, a counterclaim is not allowable which sets up a demand for the use and occupation of premises let by defendant to plaintiff. Frick v. Freudenthal, 45 Misc. 348, 90 N. Y. Supp. 344.

977, n. 276. In an action for conversion of money, a counterclaim to recover margins deposited to secure a purchase of

stock ordered but not purchased is proper. O'Brien v. Dwyer, 76 App. Div. 516, 78 N. Y. Supp. 600.

977, n. 277. Benton v. Moore, 42 Misc. 660, 87 Supp. 717.

979, n. 296. This definition of Mr. Pomeroy's is adopted in Steinmetz v. Cosmopolitan Range Co., 47 Misc. 611, 94 N. Y. Supp. 456.

982, n. 314. See, also, Bayne v. Hard, 77 App. Div. 251, 79 N. Y. Supp. 208.

982, n. 315. See, also, Silver v. Krellman, 89 App. Div. 363, 85 N. Y. Supp. 945.

982, n. 316. See, also, Hunter v. Fiss, 92 App. Div. 164, 86 N. Y. Supp. 1121.

984. A counterclaim must be treated as a separate plea, and upon demurrer thereto the defendant is not even entitled to the benefit of denials made elsewhere in the answer, unless incorporated in the separate plea by reiteration or appropriate reference. Blaut v. Blaut, 41 Misc. 572, 85 N. Y. Supp. 146; Gray Lithograph Co. v. American Watchman's Time Detector Co., 44 Misc. 206, 88 N. Y. Supp. 857; Goldberg v. Wood, 45 Misc. 327, 90 N. Y. Supp. 427.

984, n. 328. Mason v. Mason, 46 Misc. 361, 94 N. Y. Supp. 868.

984, n. 329. Gilsey v. Keen, 104 App. Div. 427, 93 N. Y. Supp. 783. So if defendant defines it as a counterclaim he cannot insist on its sufficiency as a defense. Rogers v. Morton, 46 Misc. 494, 95 N. Y. Supp. 49.

988, n. 5. Babcock v. Clark, 93 App. Div. 119, 121, 86 N. Y. Supp. 976; Spier v. Hyde, 78 App. Div. 151, 157, 79 N. Y. Supp. 699.

989. A reply will not be compelled where the answer merely contains statements denying what the plaintiff must prove in order to succeed. Burr v. Union Surety & Guaranty Co., 86 App. Div. 545, 83 N. Y. Supp. 756. But a reply is properly ordered in ejectment where defendant alleges title by purchase at foreclosure sale, in order to enable defendant to prepare for trial. Timble v. Russell, 41 Misc. 577, 85 N. Y. Supp. 109.

989, n. 13. It is only where the substantial ends of justice will be promoted thereby that the service of a reply will be

compelled. Hallenborg v. Greene, 87 App. Div. 259, 84 N. Y. Supp. 319; Pope Mfg. Co. v. Rubber Goods Mfg. Co., 100 App. Div. 514, 91 N. Y. Supp. 831.

990, n. 26. The phrase "in ordinary and concise language, without repetition" was changed by Laws 1904, c. 500, to "clear, precise and unequivocal language," but was again changed to its original form by Laws 1905, c. 431. A reply was, in part, as follows: "49. Plaintiff reiterates the allegations and denials contained in paragraphs 1, 5, 6, 7, 8, 9, 10 and 11 of this reply," etc. "50. It admits the allegations contained in the articles or paragraphs of the answer designated as (32), (47), (48), (103), (104), (105), (106,) (107) and (109)." "51. It denies each and every allegation contained in the articles or paragraphs of the answer designated as (14), (20), (21), (25), (26), (27), (28), (30), (136), and (138)." It was held to violate the Code rule requiring the matter averred to be stated in clear and concise language. Pope Mfg. Co. v. Rubber Goods Mfg. Co., 100 App. Div. 349, 91 N. Y. Supp. 828.

991. The reply cannot contain a counterclaim to a counterclaim set up in the answer, but plaintiff must seek relief by an amendment to his complaint. Fett v. Greenstein, 92 N. Y. Supp. 736.

991, n. 29. Followed in Perry v. Levenson, 82 App. Div. 94, 101, 81 N. Y. Supp. 586.

991, n. 35. Averments of matter contained in the reply, if inconsistent with the complaint, cannot be availed of by the plaintiff as a part of its affirmative cause of action. Pope Mfg. Co. v. Rubber Goods Mfg. Co., 100 App. Div. 349, 91 N. Y. Supp. 828.

995, n. 16. Failure to add to the statement of the representative character of the defendants the words "as trustees" in addition to the words "as executors," is not a sufficient reason for sustaining a demurrer to the complaint, especially where the complaint contains a copy of the will, and further allegations showing that as executors the defendants have accepted the trusts created by the will. Rowe v. Rowe, 103 App. Div. 100, 92 N. Y. Supp. 491.

997, n. 24. So held where the action was against a foreign

corporation and the complaint contained no allegations as to where plaintiff resided. Herbert v. Montana Diamond Co., 81 App. Div. 212, 80 N. Y. Supp. 717.

998, n. 36. Tew v. Wolfsohn, 77 App. Div. 454, 79 N. Y. Supp. 286; Hall v. Gilman, 77 App. Div. 458, 464, 79 N. Y. Supp. 303, 307. A demurrer does not lie for multifariousness. Id.

998, n. 38. This rule also applies where the defect is set up by answer. Shanks v. National Casket Co., 95 App. Div. 187, 88 N. Y. Supp. 839.

999, n. 44. Where misjoinder of causes of action was raised by a motion to compel plaintiff to separate and number the causes of action, and defendants did not appeal from an adverse ruling thereon, they were not entitled thereafter to raise such objection by demurrer. O'Connor v. Virginia Passenger & Power Co., 92 N. Y. Supp. 525.

999, n. 45. Reed v. Livermore, 101 App. Div. 254, 91 N. Y. Supp. 986. A demurrer for misjoinder is proper, where there is only a single count, without first moving to compel the causes of action to be separately stated. Powers v. Sherin, 89 App. Div. 37, 85 N. Y. Supp. 89. But see Whitney v. Wenman, 96 App. Div. 290, 293, 89 N. Y. Supp. 296.

999, n. 49. The rule laid down in the text is overruled by the court of appeals which holds that to sustain a demurrer on the ground of improper joinder of causes of action, there must be two or more causes of action plainly stated, each in itself complete and perfect on a fair and reasonable construction of the language employed. Tew v. Wolfsohn, 174 N. Y. 272, followed in Mack v. Latta, 83 App. Div. 242, 252, 82 N. Y. Supp. 130.

999, n. 50. Cannot be set up as a defense in the answer or reply. Schlesinger v. Thalmessinger, 92 N. Y. Supp. 575.

1000, n. 53. Hall v. Gilman, 77 App. Div. 458, 461, 79 N. Y. Supp. 302; Budd v. Howard Thomas Co., 40 Misc. 52, 81 N. Y. Supp. 152; Wallace v. Jones, 182 N. Y. 37.

1000, n. 57. Cited in Seamans v. Barentsen, 180 N. Y. 333, 336, but disapproved in so far as the dicta holds that the objection "must" be raised by demurrer.

1000, n. 59. Woolf v. Barnes, 46 Misc. 169, 93 N. Y. Supp. 219; Schenectady Contracting Co. v. Schenectady R. Co., 106 App. Div. 336, 94 N. Y. Supp. 401.

1001, n. 61. See, as contra, Corscadden v. Haswell, 88 App. Div. 158, 161, 84 N. Y. Supp. 597.

1001, nn. 61, 62. Where there are no facts appearing in the complaint which would warrant the relief asked for therein, or any part thereof, though the facts do warrant relief not contemplated by plaintiff, a demurrer will be sustained. Hasbrouck v. New Paltz, H. & P. Traction Co., 98 App. Div. 563, 90 N. Y. Supp. 977.

1001, n. 66. Zebley v. Farmers' Loan & Trust Co., 139 N. Y. 461.

1001, n. 70. Stating facts in the alternative, where any one of the averments would be sufficient on which to found the relief asked for, is not a ground of demurrer, but if they are uncertain the remedy is by motion. Hasberg v. Moses, 81 App. Div. 199, 205, 80 N. Y. Supp. 867. A complaint in an action against a master to recover damages for death by wrongful act is not demurrable because it alleges that death was caused by defendant's negligence without stating the facts to show negligence, though it might be subject to a motion to make more definite and certain. Ellsworth v. Franklyn County Agr. Soc., 99 App. Div. 119, 91 N. Y. Supp. 1040.

1002, n. 77. Onderdonk v. Peale, Peacock & Kerr, 104 App. Div. 195, 93 N. Y. Supp. 505.

1002, n. 79. Uggla v. Brokaw, 77 App. Div. 310, 313, 79 N. Y. Supp. 244.

1003. Matter set up as defense is demurrable where it constitutes no bar to the action, though it might be available as a counterclaim. Farmers' Nat. Bank v. St. Regis Paper Co., 77 App. Div. 558, 78 N. Y. Supp. 889. A demurrer to the defense of statute of limitations lies where the insufficiency of the plea is clearly apparent. Gray Lith. Co. v. American Watchman's Time Detector Co., 44 Misc. 206, 88 N. Y. Supp. 857. Where a defendant, brought in by supplemental summons, sets up in his answer objections to the sufficiency of the amended complaint under section 498 of the Code, it may be demurred to as a defense. Nellis v. Rowles, 41 Misc. 313, 84 N. Y. Supp. 753.

1003, n. 84. If the facts alleged in an answer have relation to the subject-matter, and are calculated to affect the action

of the court in determining whether an injunction should be granted, or its extent if one is granted, the effect that will be given to them cannot be determined on demurrer. Straus v. American Publishers' Ass'n, 103 App. Div. 277, 92 N. Y. Supp. 1052. When a defense consists of facts which the defendant will prove upon the trial to affect the extent of discretionary relief that a court of equity will grant, it is not insufficient, upon the face thereof, even though it would appear upon an inspection of the pleadings that the facts alleged would not in themselves be sufficient to justify the court in refusing the plaintiff any relief. Id.

1003, n. 85. Butler v. General Acc. Assur. Corp., 103 App. Div. 273, 92 N. Y. Supp. 1025.

1003, n. 90. Uggla v. Brokaw, 77 App. Div. 310, 315, 79 N. Y. Supp. 244. Kraus v. Agnew is officially reported in 80 App. Div. 1. The contrary, i. e., that a so-called "defense" which sets up no new matter other than that put in issue by a denial is demurrable because it is "insufficient in law on the face thereof," is held in George v. City of N. Y., 42 Misc. 270, 86 N. Y. Supp. 610; Blumenfeld v. Stine, 42 Misc. 411, 87 N. Y. Supp. 81; Jaeger v. City of N. Y., 39 Misc. 543, 80 N. Y. Supp. 356.

1003, n. 92. The Olivella case was affirmed in 51 App. Div. 612, 64 N. Y. Supp. 1145, on the authority of Golden v. Health Dept., 21 App. Div. 420, 47 N. Y. Supp. 623, and was followed in Edmonds v. Stern, 89 App. Div. 539, 85 N. Y. Supp. 665, which fix the rule, at least in the first department, that where the complaint is purely equitable in its nature and only equitable relief can be afforded, a defense that there is an adequate remedy at law is demurrable.

1003, n. 93. So held in Corn v. Levy, 97 App. Div. 48, 89 N. Y. Supp. 658, which reviews the conflicting decisions.

1003, n. 94. Uggla v. Brokaw, 77 App. Div. 310, 313, 79 N. Y. Supp. 244; Holmes v. Northern Pac. R. Co., 65 App. Div. 49, 72 N. Y. Supp. 476; Blaut v. Blaut, 41 Misc. 572, 85 N. Y. Supp. 146.

1004, n. 97. But where, in an action for slander, matters in justification are set forth as a complete defense and matters in

mitigation as a partial defense, plaintiff may demur solely to that part of the answer setting up justification. Jansen v. Fischer, 45 Misc. 361, 90 N. Y. Supp. 346.

1004, n. 99. A counterclaim which demands an affirmative judgment is not demurrable on the ground that "it is insufficient in law on the face thereof." Hudson River Water Power Co. v. Glens Falls Gas & E. L. Co., 90 App. Div. 513, 85 N. Y. Supp. 577.

1005, n. 108. Schilling Co. v. Robert H. Reid & Co., 42 Misc. 94, 85 N. Y. Supp. 1010.

1005, n. 109. Warner v. James, 88 App. Div. 567, 85 N. Y. Supp. 153.

1011. The sufficiency of a pleading to which a demurrer is interposed should not be determined on a concession which forms no part of the record, and is not incorporated in the pleading by an appropriate amendment. Keene v. Newark Watch Case Material Co., 81 App. Div. 48, 80 N. Y. Supp. 859. On demurrer to a counterclaim, defendant cannot urge its sufficiency as a defense. Rogers v. Morton, 46 Misc. 494, 95 N. Y. Supp. 49.

1011, n. 149. Mott v. De Nisco, 106 App. Div. 154, 94 N. Y. Supp. 380; Blumenfeld v. Stine, 42 Misc. 411, 87 N. Y. Supp. 81.

1012, n. 158. A demurrer to the whole answer should be overruled if there is an issue raised by any of the denials or allegations. George A. Fuller Co. v. Manhattan Const. Co., 44 Misc. 219, 88 N. Y. Supp. 1049.

1012, n. 159. A demurrer, for insufficiency, to new matter in the answer, requires that it, as well as the matter alleged in the complaint to which the answer refers, be taken as admitted. Schlesinger v. Burland, 42 Misc. 206, 208, 85 N. Y. Supp. 350.

1012, n. 163. Petty v. Emery, 96 App. Div. 35, 88 N. Y. Supp. 823.

1013, n. 177. Bigelow v. Drummond, 42 Misc. 617, 620, 87 N. Y. Supp. 581.

1014, n. 180. George v. City of N. Y., 42 Misc. 270, 274, 86 N. Y. Supp. 610; Bigelow v. Drummond, 42 Misc. 617, 87 N. Y. Supp. 581.

1016, n. 199. Where the overruling of a demurrer with leave to plead over is affirmed by the appellate division without

granting such leave, an application for leave to plead over can be made only to the appellate division. White v. Jackson, 39 Misc. 218, 79 N. Y. Supp. 393.

1019. In the second line in the last form, change the words "found by plaintiff" to "formed by plaintiff's complaint."

1019, n. 220. The judgment should follow the order or decision. It should not direct that, in case of failure to plead over, judgment be entered for the sum demanded in the complaint. It should provide that, in case of failure to plead over, final judgment may be entered in accordance with the provisions of the Code of Civil Procedure applicable in such cases. Smythe v. Greacen, 96 App. Div. 182, 89 N. Y. Supp. 111.

1024, nn. 28, 29. There is no question but what service by mail gives the "opposing" party double time to serve an amended pleading as of course. Bucklin v. Buffalo, A. & A. R. Co., 41 Misc. 557, 85 N. Y. Supp. 114.

1024, n. 29. Contra, Bates v. Plasmon Co., 41 Misc. 16, 83 N. Y. Supp. 573.

1025, n. 42. To show that the amended pleading was served for purpose of delay, threats to use dilatory tactics if a proposition for settlement of the cause of action was not accepted are properly considered. Naylor v. Loomis, 79 App. Div. 21, 79 N. Y. Supp. 1011.

1025, n. 43. Where plaintiff served a notice of trial before answer, pursuant to an order of court granting an extension of the time to answer on condition that the issue be as of the date the answer was originally due, and thereafter defendant served an amended answer as of course, it was improper to strike out the amended answer unless defendant consented that the date of issue remain as if no amended answer had been served. Muglia v. Erie R. Co., 97 App. Div. 532, 90 N. Y. Supp. 216.

1026, n. 50. That the granting of the order is discretionary, see Westinghouse, Church, Kerr & Co. v. Remington Salt Co., 89 App. Div. 126, 85 N. Y. Supp. 432.

1027. An unnecessary amendment will not be allowed. Le Brantz v. Campbell, 89 App. Div. 583, 85 N. Y. Supp. 654. So held where act sought to be enjoined was discontinued before trial and plaintiff sought to amend by striking out demand for injunctive relief. Whaley v. City of N. Y., 83 App. Div. 6, 81

N. Y. Supp. 1043. So leave will not be given to serve an amended answer setting up as special defenses facts provable under the general denial already pleaded. Schultz v. Greenwood Cemetery, 46 Misc. 299, 93 N. Y. Supp. 180. A defense referring to another defense for certain of its facts may set forth such facts in full in an amended answer even after they have, on motion, been stricken out of the defense referred to. Edison v. Press Pub. Co., 85 App. Div. 376, 83 N. Y. Supp. 174.

1028, nn. 72, 73. A motion before a referee made on the first day for the hearing and decided at the next hearing cannot be said to be made before the trial. Barnum v. Williams, 91 App. Div. 464, 467, 86 N. Y. Supp. 821.

1029. Leave to amend is properly denied, where the amendment would have imported into the trial, and near its close, an issue which was not suggested in the pleadings, and one which the defendant, according to his attorney, was not prepared to try, especially where the fact that the issue sought to be introduced by amendment was not presented by the pleadings, was called to the attention of the plaintiff's attorney by the trial justice, who at the same time suggested to him that he withdraw a juror, and apply at special term for leave to amend the complaint in the respects desired, and in such a way that the action could be tried in equity, where full justice could be done between the parties, and the attorney refused so to do. Kuntz v. Schnugg, 99 App. Div. 191, 90 N. Y. Supp. 933.

1029, n. 76. Rosseau v. Rouss, 91 App. Div. 230, 233, 86 N. Y. Supp. 497. Negligence and nuisance are different causes of action. Moniot v. Jackson, 40 Misc. 197, 81 N. Y. Supp. 688. New defense cannot be set up by amendment on the trial. Robinson v. Lampel, 97 App. Div. 198, 89 N. Y. Supp. 853.

1030, n. 83. This case is criticized in Schun v. Brooklyn Heights R. Co., 82 App. Div. 560, 81 N. Y. Supp. 859, and the court refuses to follow it in so far as it holds that a plaintiff cannot, by amendment after issue joined, add a third joint tort feasor as a party defendant.

1031. Facts which, under a recent decision of the court of appeals, plaintiff deems necessary to add to insure the retention of jurisdiction of the action by the supreme court, may be set up by amendment. Meeks v. Meeks, 79 App. Div. 49, 79

N. Y. Supp. 718. The complaint may be amended by specifying the charge of negligence with greater detail (Straus v. Buchman, 96 App. Div. 270, 89 N. Y. Supp. 226); or by substituting for an allegation of full performance of the contract an allegation of part performance and an excuse for the nonperformance (Barnum v. Williams, 91 App. Div. 464, 86 N. Y. Supp. 821); or so as to permit a recovery of the damages resulting from the breach of the contract intermediate the commencement of the action and the trial thereof (Dunham v. Hastings Pavement Co., 95 App. Div. 360, 362, 88 N. Y. Supp. 835); or so as to allege the substitution of other materials in place of those called for by the contract (Poerschke v. Horowitz, 84 App. Div. 443, 82 N. Y. Supp. 742).

1032. An amendment is proper to conform the complaint to the proof as to date of the injury sued for, where defendant makes no claim of surprise. Ladrick v. Village of Green Island, 103 App. Div. 71, 92 N. Y. Supp. 622. The allegation that notice of intention to sue was given to the corporation counsel may be amended to conform to the proof by adding "prior to the commencement of the action." Shaw v. City of N. Y., 83 App. Div. 212, 214, 82 N. Y. Supp. 44.

1032, n. 98. Clark v. Brooklyn Heights R. Co., 78 App. Div. 478, 79 N. Y. Supp. 811. The amendment may be allowed at the close of the trial. Dunham v. Hastings Pavement Co., 95 App. Div. 360, 363, 88 N. Y. Supp. 835.

1032, n. 99. Smith v. City of Auburn, 88 App. Div. 396, 84 N. Y. Supp. 725; Scarry v. Metropolitan St. R. Co., 39 Misc. 802, 81 N. Y. Supp. 284.

1032, n. 101. See, also, Carlisle v. Barnes, 102 App. Div. 582, 92 N. Y. Supp. 924.

1033, n. 107. Rowe v. Gerry, 86 App. Div. 349, 83 N. Y. Supp. 740; Zeiser v. Cohn, 44 Misc. 462, 474, 90 N. Y. Supp. 66; Page v. Delaware & H. Canal Co., 76 App. Div. 160, 78 N. Y. Supp. 454.

1033, n. 111. Zeiser v. Cohn, 44 Misc. 462, 474, 90 N. Y. Supp. 66.

1035, n. 124. Coyle v. Davidson, 42 App. Div. 322, 86 N. Y. Supp. 1089. An amendment which merely amplifies the com-

plaint by setting forth more fully the grounds on which the defendant is liable, and the items of damage, is proper. Id.

1035, § 904. The special term has power, after the entry of an interlocutory judgment and during the pendency of a reference directed by such interlocutory judgment, to allow an amendment of the complaint, by enlarging the cause of action, but in such case all proceedings fall and a new trial under the amended complaint is necessary. Wilson v. Standard Asphalt Co., 81 App. Div. 102, 81 N. Y. Supp. 8.

1036. The statute of limitations, where it operates on the liability and not merely on the remedy, may be allowed to be interposed by amendment before a second trial. Colell v. Delaware L. & W. R. Co., 80 App. Div. 342, 80 N. Y. Supp. 675. Amendment of complaint by appellate court, see Thrall v. Cuba Village, 88 App. Div. 410, 415, 84 N. Y. Supp. 661. The appellate court cannot amend to conform to the proof where evidence was objected to in lower court as not admissible under the pleadings. Page v. Delaware & H. Canal Co., 76 App. Div. 160, 78 N. Y. Supp. 454.

1037, n. 141. Electric Boat Co. v. Howey, 88 App. Div. 522, 85 N. Y. Supp. 95.

1037, n. 146. But see Bailey v. Kraus, 39 Misc. 845, 81 N. Y. Supp. 492. Where the motion, made before trial, was denied for laches, it should not thereafter be granted after a reversal of the judgment on appeal. A. & S. Henry & Co. v. Talcott, 89 App. Div. 76, 85 N. Y. Supp. 98.

1037, n. 148. It is not necessarily error to permit an amendment "at the trial," to set up special damages, where defendant chooses to proceed instead of asking for a postponement of the trial and excepting to the ruling if the motion was denied. Werner v. Hearst, 76 App. Div. 375, 384, 78 N. Y. Supp. 788.

1037, n. 149. See, also, Coyle v. Davidson, 92 App. Div. 322, 325, 86 N. Y. Supp. 1089.

1038. The attorney should make the affidavit, instead of the client, where the inadvertence or neglect sought to be excused is that of the attorney. Kent v. Ætna Ins. Co., 88 App. Div. 518, 85 N. Y. Supp. 164.

1038, n. 151. Service of amended pleading, by leave of court,

after the hearing of the application, held sufficient in Kent v. Ætna Ins. Co., 88 App. Div. 518, 85 N. Y. Supp. 164.

1038, n. 152. A. & S. Henry & Co. v. Talcott, 89 App. Div. 76, 85 N. Y. Supp. 98; Mutual Loan Ass'n v. Lesser, 81 App. Div. 138, 80 N. Y. Supp. 1112; Kent v. Ætna Ins. Co., 88 App. Div. 518, 85 N. Y. Supp. 164; Treadwell v. Clark, 45 Misc. 268, 92 N. Y. Supp. 166.

1038, n. 154. Pratt, Hurst & Co. v. Tailer, 99 App. Div. 236, 90 N. Y. Supp. 1023; Barnum v. Williams, 91 App. Div. 464, 468, 86 N. Y. Supp. 821; Mutual Loan Ass'n v. Lesser, 81 App. Div. 138, 80 N. Y. Supp. 1112. That it is sufficient to refer to proposed amended pleading for the facts, such pleading being on information and belief without stating the sources of the information, see Meeks v. Meeks, 79 App. Div. 49, 79 N. Y. Supp. 718.

1039, n. 161. Want of knowledge of the subject of the amendment at the time the pleading was interposed should be shown. Barnum v. Williams, 91 App. Div. 464, 468, 86 N. Y. Supp. 821.

1039, n. 162. Two years delay in moving was held excusable in Blackburn v. American News Co., 89 App. Div. 82, 85 N. Y. Supp. 440.

1039, n. 165. Mutual Loan Ass'n v. Lesser, 81 App. Div. 138, 80 N. Y. Supp. 1112.

1039, n. 167. The official citation is 82 App. Div. 145, 81 N. Y. Supp. 701.

1042, n. 191. Callahan v. New York Cent. & H. R. R. Co., 99 App. Div. 56, 90 N. Y. Supp. 657.

1043, n. 204. On allowing an amendment of the complaint, payment of all costs after the service of the complaint should be imposed. Lindblad v. Lynde, 81 App. Div. 603, 81 N. Y. Supp. 351.

1044. The fact that the objection which appeared on the face of the complaint was not taken by demurrer or answer should, it seems, be taken into consideration in fixing the terms on allowing an amendment of the complaint. Mooney v. Valentine, 79 App. Div. 41, 79 N. Y. Supp. 698. Repayment of costs of demurrer held improper in Kent v. Ætna Ins. Co., 88 App. Div. 518, 85 N. Y. Supp. 164.

1044, n. 212. Meeks v. Meeks, 79 App. Div. 49, 79 N. Y. Supp. 718.

1044, n. 214. Bruns v. Brooklyn Citizen, 98 App. Div. 316, 90 N. Y. Supp. 701.

1044, n. 215. Fifty dollars imposed as condition in Steinbach v. Prudential Ins. Co., 92 App. Div. 440, 87 N. Y. Supp. 107. Where the cause of action was not changed, fifty dollars' costs was held sufficient in Miller v. Carpenter, 79 App. Div. 130, 80 N. Y. Supp. 82.

1045. On allowing an amendment radically changing the cause of action, the defendant should be relieved from his waiver of a jury trial. Reese v. Baum, 83 App. Div. 550, 82 N. Y. Supp. 157. Where a juror is withdrawn and plaintiff allowed to apply at special term for an amendment, the requiring, as a condition of allowing an amendment in effect stating a new cause of action, of payment of only ten dollars costs and compelling defendant to answer in five days and restoring the case to its place on the day calendar is improper. Payment of trial fee in addition to ten dollars costs, twenty days to answer, and allowing case to take its regular place on the calendar but not to be restored to the day calendar, was ordered by the appellate division. Diebold v. Walter, 83 App. Div. 254, 82 N. Y. Supp. 37. Effect of requiring action to retain its position on the calendar, on allowing amendment of answer on motion to compel plaintiff to serve a reply, see Hollenborg v. Greene, 87 App. Div. 259, 84 N. Y. Supp. 219.

1047, n. 237. But see Poerschke v. Horowitz, 84 App. Div. 443, 82 N. Y. Supp. 742.

1047, n. 238. Lewis v. Pollack, 85 App. Div. 577, 580, 83 N. Y. Supp. 287.

1048, n. 242. Serrell v. Forbes, 106 App. Div. 482, 94 N. Y. Supp. 805.

1051, n. 7. Le Boeuf v. Gray, 42 Misc. 632, 87 N. Y. Supp. 597. Facts occurring after the commencement of the action but before the expiration of the time to answer need not be set up by supplemental answer but may be alleged in the original answer. Burke v. Rhoads, 82 App. Div. 325, 81 N. Y. Supp. 1045.

1051, n. 10. Industrial & General Trust v. Tod, 93 App. Div. 263, 273, 87 N. Y. Supp. 687.

1052, n. 13. Admission of "due and timely" service of the pleading waives the failure to obtain leave of court. Greenblatt v. Mendelsohn, 92 N. Y. Supp. 963.

1053, n. 24. See, also, Hunt v. Provident Sav. Life Assur. Soc., 77 App. Div. 338, 79 N. Y. Supp. 74.

1053, n. 26. But in an action for separation on the ground of cruel and inhuman treatment, specific acts of cruelty occurring since the commencement of the action may be set up by supplemental answer. Smith v. Smith, 99 App. Div. 283, 90 N. Y. Supp. 927.

1053, n. 28. Smith v. Bach, 82 App. Div. 608, 81 N. Y. Supp. 1057.

1054, § 914. Leave to file a supplemental answer, setting up the exchange of consents to discontinue the action and the exchange of general releases by plaintiff to defendant, should be granted, to enable defendant to obtain an adjudication on a defense which he claims constitutes a bar to the action. Tucker v. Dudley, 93 N. Y. Supp. 355.

1056 n. 48. But leave should not be refused because the judgment "may" not constitute a bar. Rio Tinto Copper Mining Co. v. Black, 85 N. Y. Supp. 1116.

1056, n. 51. May be refused because of laches. Jones v. Jones, 99 App. Div. 267, 90 N. Y. Supp. 1002.

1057, n. 54. Delay of few months in interposing judgment of South Dakota was held not fatal in Rio Tinto Copper Mining Co. v. Black, 85 N. Y. Supp. 1116.

1058, n. 69. Requiring payment of fifteen dollars costs is inadequate. Pickrell v. Mendel, 87 App. Div. 163, 84 N. Y. Supp. 70.

1059, § 918. On bringing in the trustee in bankruptcy of the defendants as an additional defendant, it was held that the original and supplemental complaints, taken together, need not state a cause of action against the trustee, in Latimer v. McKinnon, 85 App. Div. 224, 83 N. Y. Supp. 315.

1059, n. 75. Latimer v. McKinnon, 85 App. Div. 224, 228, 83 N. Y. Supp. 315.

1062. It should be kept in mind that the motions enumer-

ated herein, in so far as they relate to the complaint, cannot be made after defendant has obtained an extension of time to answer unless such right is reserved in the stipulation or order (Vol. I, p. 940). The court should not, on motion at special term, strike from a complaint all the allegations of special damages. Orderly practice requires, where the question arises as to whether the pleading states a cause of action or a defense, that it should be determined by a demurrer or upon a trial, either at the opening thereof, or when evidence is offered, or at the close of the case, by motion to the court; especially Pavenstedt v. New York Life Ins. Co., 103 App. Div. 36, 92 N. Y. Supp. 853.

1063. The motion should not be granted where the meaning and application of the allegations are clear, the theory upon which plaintiffs rely is not obscure, and further particulars of time and place are not essential to a comprehensive statement of the cause of action. Smith v. Irvin, 45 Misc. 262, 92 N. Y. Supp. 170.

1063, n. 5. Day v. Day, 98 App. Div. 314, 90 N. Y. Supp. 680.

1064, n. 18. An answer may be required to be made more definite as to what is denied and what is admitted. Borsuk v. Blauner, 93 App. Div. 306, 87 N. Y. Supp. 851.

1064, n. 22. See, also, Viner v. James, 92 App. Div. 542, 87 N. Y. Supp. 257. "It is only where the 'precise meaning or application' of an allegation of a pleading is indefinite and uncertain that the court can require the pleading to be amended. If the meaning and application of the allegation can be seen with reasonable certainty, an amendment should not be directed." Dumar v. Witherbee, Sherman & Co., 88 App. Div. 181, 84 N. Y. Supp. 669; Kavanaugh v. Commonwealth Trust Co., 45 Misc. 201, 91 N. Y. Supp. 967. Matters of time, place, and circumstance, unless they constitute material parts of the cause of action or defense, are strictly within the province of a bill of particulars and must be obtained by that method rather than by a motion to make more definite and certain. Dumar v. Witherbee, Sherman & Co., 88 App. Div. 181, 84 N. Y. Supp. 669; Kavanaugh v. Commonwealth Trust Co., 45 Misc. 201, 91 N. Y. Supp. 967. When all that a party to an action really wants is a more particular statement of his opponent's claim for the purpose of narrowing the issues at the trial, or to pre-

vent surprise, he should apply for a bill of particulars instead of moving to make more definite and certain. Dumar v. Witherbee, Sherman & Co., 88 App. Div. 181, 84 N. Y. Supp. 669.

1064, n. 23. In Kavanaugh v. Commonwealth Trust Co., 45 Misc. 201, 91 N. Y. Supp. 967, Justice Spencer refers to the statement in the text, and states that the practice should be discouraged, if not condemned.

1065, n. 25. Where pleading is served by mail, forty days is allowed to make the motion. Borsuk v. Blauner, 93 App. Div. 306, 87 N. Y. Supp. 851.

1066, n. 37. The motion is not favored by the courts. Dinkelspiel v. New York Evening Journal Pub. Co., 91 App. Div. 96, 98, 86 N. Y. Supp. 375.

1066, n. 38. Dinkelspiel v. New York Evening Journal Pub. Co., 91 App. Div. 96, 98, 86 N. Y. Supp. 375; Westervelt v. New York Times Co., 91 App. Div. 72, 86 N. Y. Supp. 454; John Church Co. v. Parkinson, 86 App. Div. 163, 83 N. Y. Supp. 175; American Farm Co. v. Rural Pub. Co., 78 App. Div. 268, 79 N. Y. Supp. 911.

1066, nn. 41, 42. In opposition to the rule laid down in the text is Uggla v. Brokaw, 77 App. Div. 310, 79 N. Y. Supp. 244, which holds that where an entire count in an answer is redundant, as where it sets up a defense provable under the general issue which has been pleaded, it may be stricken out.

1066, n. 43. Facts which constitute a defense may not be stricken out as scandalous; but, on the other hand, facts pleaded as a complete defense, which would be demurrable as constituting only a partial defense, or as being at most in mitigation of damages, may be stricken out as scandalous upon the theory that the party aggrieved thereby should not be required to admit the truth of the allegations by demurring thereto. Persch v. Weideman, 106 App. Div. 553, 94 N. Y. Supp. 800.

1067. Repetitions of denials, contained in a defense, will be stricken out as redundant. Burnham v. Franklin, 44 Misc. 299, 89 N. Y. Supp. 917; Dinkelspiel v. New York Evening Journal Pub. Co., 91 App. Div. 96, 100, 86 N. Y. Supp. 375. A reiteration, in a "defense," of "all the admissions and denials" in preceding paragraphs, will be stricken out as irrelevant and redundant. Blaut v. Blaut, 41 Misc. 572, 85 N. Y. Supp. 146.

An answer is evasive where it shifts the time to which its allegations relate to a date much later than the date of the verification of the complaint to which time the allegations of the complaint relate. Straus v. American Publishers' Ass'n, 96 App. Div. 315, 316, 89 N. Y. Supp. 172. Matters irrelevant as to the moving defendant should not be stricken out where it is material to the cause of action alleged against the other defendants. Brown v. Fish, 76 App. Div. 329, 78 N. Y. Supp. 414. If relevant, matter cannot be stricken out because scandalous, on motion to strike out as redundant, irrelevant, and scandalous. Bell v. Clarke, 45 Misc. 275, 92 N. Y. Supp. 411. Allegations in a complaint in an action on a contract, setting out the various steps, including the legal instruments, by which plaintiff became vested with the rights of one of the parties to the contract, will not be stricken out as redundant though a general allegation might have sufficed. Pope Mfg. Co. v. Rubber Goods Mfg. Co., 100 App. Div. 353, 91 N. Y. Supp. 826.

1067, n. 45. McGarahan v. Sheridan, 106 App. Div. 532, 94 N. Y. Supp. 708; Pope Mfg. Co. v. Rubber Goods Mfg. Co., 100 App. Div. 349, 91 N. Y. Supp. 828; Ring v. Mitchell, 45 Misc. 493, 92 N. Y. Supp. 749; Palmer v. Day, 44 Misc. 579, 90 N. Y. Supp. 133; Dinkelspiel v. New York Evening Journal Pub. Co., 91 App. Div. 96, 98, 86 N. Y. Supp. 375.

1067, n. 52. Parsons v. McDonald, 88 App. Div. 552, 85 N. Y. Supp. 190; Ring v. Mitchell, 45 Misc. 493, 92 N. Y. Supp. 749. However, in Vogt v. Vogt, 86 App. Div. 437, 83 N. Y. Supp. 677; Tradesmen's Nat. Bank v. United States Trust Co., 49 App. Div. 362, 63 N. Y. Supp. 526; and Rockwell v. Day, 84 App. Div. 437, 82 N. Y. Supp. 993; the striking out of allegations of evidence was refused on the ground that the moving party was not prejudiced thereby. It seems that all statements of evidence need not be stricken out as redundant, especially in equitable actions. Bell v. Clarke, 45 Misc. 275, 92 N. Y. Supp. 411.

1068, n. 62. Day v. Day, 95 App. Div. 122, 88 N. Y. Supp. 504.

1069. Where a part, but not all, of an answer was scandalous, irrelevant, etc., it cannot be stricken from the files, nor can defendant be required to surrender the original answer to

plaintiff for cancellation, or to serve an amended pleading, but the scandalous, etc., matter should be stricken out. Persch v. Weideman, 106 App. Div. 553, 94 N. Y. Supp. 800.

1070, n. 82. Zimmerman v. Meyrowitz, 77 App. Div. 329, 79 N. Y. Supp. 159.

1071. An answer is frivolous where it denies knowledge or information sufficient to form a belief as to the truth of allegations which relate to matters of public record, open by law to public inspection and with knowledge of which the defendant is chargeable by law. City of N. Y. v. Matthews, 180 N. Y. 41, 47.

1071, n. 84. Soper v. St. Regis Paper Co., 76 App. Div. 409, 78 N. Y. Supp. 782.

1071, n. 92. Maccarone v. Hayes, 85 App. Div. 41, 82 N. Y. Supp. 1005.

1073, n. 106. Shaw v. Feltman, 99 App. Div. 514, 91 N. Y. Supp. 114; Rankin v. Bush, 93 App. Div. 181, 184, 87 N. Y. Supp. 539.

1073, n. 113. Soper v. St. Regis Paper Co., 76 App. Div. 409, 412, 78 N. Y. Supp. 782; Place v. Bleyl, 45 App. Div. 17, 60 N. Y. Supp. 800.

1076, n. 141. Schlesinger v. Wise, 106 App. Div. 587, 94 N. Y. Supp. 718.

1077, n. 146. A specific denial cannot be stricken out as sham even where inconsistent with a separate defense set up in the answer. Schlesinger v. Wise, 106 App. Div. 587, 94 N. Y. Supp. 718; Schlesinger v. McDonald, 106 App. Div. 570, 94 N. Y. Supp. 721.

1077, n. 147. Hopkins v. Meyer, 76 App. Div. 365, 78 N. Y. Supp. 459.

1077, nn. 147, 148. Schlesinger v. McDonald, 106 App. Div. 570, 94 N. Y. Supp. 721.

1077, n. 151. The falsity must appear beyond a reasonable doubt. Zimmerman v. Meyrowitz, 77 App. Div. 329, 79 N. Y. Supp. 159. It is not enough that a material fact contained in the original answer which was held bad on demurrer was omitted from the amended answer. Id.

1084, n. 206. A motion for judgment on the pleadings should

not be made before the opening of the trial. Durham v. Durham, 99 App. Div. 450, 91 N. Y. Supp. 295.

1085, n. 212. Causes of action for an accounting under a contract and for its cancellation are not inconsistent. Gowans v. Jobbins, 90 App. Div. 429, 86 N. Y. Supp. 312.

1085, n. 216. In the absence of injury to the defendant, where the proof will be practically the same in support of both causes of action, the special term will deny a motion before trial to compel an election, without prejudice, it seems, to a motion at the trial. Monigan v. Erie R. Co., 99 App. Div. 603, 91 N. Y. Supp. 657.

1086, n. 226. The motion may be granted at the close of the testimony though properly denied before. Rosenberg v. Heidelberg, 98 App. Div. 17, 90 N. Y. Supp. 684.

1088. Where the complaint discloses the theory of the action, and plaintiff concedes that he relies upon but one cause of action, the motion to separately state and number will be denied. Ring v. Mitchell, 45 Misc. 493, 92 N. Y. Supp. 749.

1088, n. 238. Ring v. Mitchell, 45 Misc. 493, 92 N. Y. Supp. 749.

1088, n. 240. Weed v. First Nat. Bank, 106 App. Div. 285, 94 N. Y. Supp. 681; Smith v. Irvin, 45 Misc. 262, 92 N. Y. Supp. 170; Woods v. McClure, 42 Misc. 8, 85 N. Y. Supp. 549. If elaborate argument is necessary to show that more than one cause of action is stated, the motion will not be granted. People v. Buell, 85 App. Div. 141, 83 N. Y. Supp. 143.

1089, n. 244. But it seems that inasmuch as inconsistent averments in the reply cannot be used to help out the plaintiff's cause of action, no prejudice can result from a refusal to strike out such averments. Pope Mfg. Co. v. Rubber Goods Mfg. Co., 100 App. Div. 349, 91 N. Y. Supp. 828.

1090, n. 2. Failure to state cause of action is not waived by failure to demur. Thrall v. Cuba Village, 88 App. Div. 410, 84 N. Y. Supp. 661. The fact that the complaint shows on its face that the oral contract relied on is invalid within the statute of frauds does not prevent the objection being taken by answer instead of by demurrer since the objection really is that no cause of action is stated and that objection is not waived by a.

failure to demur. Seamans v. Barentsen, 180 N. Y. 333, reversing 78 App. Div. 36, 79 N. Y. Supp. 212. Failure to state a cause of action is waived, however, so far as to permit an appellate court to amend the complaint to conform to the evidence so as to sustain the judgment, where a motion to dismiss the complaint because thereof is denied at the opening of the case, with leave to renew, and the motion to dismiss made at the close of plaintiff's case and of all the evidence did not refer to the insufficiency of the complaint nor was any of the evidence objected to as inadmissible under the complaint. Johnson v. City of Albany, 86 App. Div. 567, 571, 83 N. Y. Supp. 1002. The withdrawal of a demurrer does not estop the defendant from objecting on the trial that the complaint does not state a cause of action. Seydel v. Corporation Liquidating Co., 92 N. Y. Supp. 225. Objection to jurisdiction of court is not waived. Le Brantz v. Campbell, 89 App. Div. 583, 85 N. Y. Supp. 654.

1090, n. 4. Waters v. Spencer, 44 Misc. 15, 89 N. Y. Supp. 693. The existence of a cause of action should be distinguished from the capacity to sue. Town of Ulysses v. Ingersoll, 81 App. Div. 304, 80 N. Y. Supp. 924.

1091, n. 6. Ward v. Smith, 95 App. Div. 432, 434, 88 N. Y. Supp. 700. Exception to rule, as laid down in note, followed in Jewett v. Schmidt, 45 Misc. 34, 90 N. Y. Supp. 848; Kent v. Ætna Ins. Co., 84 App. Div. 428, 82 N. Y. Supp. 817. If the objection, apparent on the face of the complaint, is not taken by demurrer, it is improper for the court, on the hearing of a demurrer to the answer, to grant the defendant leave to demur to the complaint because of a defect of parties. Ward v. Smith, 95 App. Div. 432, 88 N. Y. Supp. 700.

1091, n. 7. Jacobs v. New York Cent. & H. R. R. Co., 107 App. Div. 134, 94 N. Y. Supp. 954.

1091, n. 8. Ward v. Smith, 95 App. Div. 432, 88 N. Y. Supp. 700; Shaw v. City of N. Y., 83 App. Div. 212, 216, 82 N. Y. Supp. 44.

1093, § 938. Where a pleading is returned on one ground, other grounds are waived. Tolhurst v. Howard, 94 App. Div. 439, 88 N. Y. Supp. 235. Retention of an answer precludes the plaintiff from treating it as a nullity because of the failure to

serve with an order for the trial of the issues, in an action against a corporation. Tautphoeus v. Harbor & S. Bldg. & Sav. Ass'n, 96 App. Div. 23, 26, 88 N. Y. Supp. 709.

1093, n. 22. Story v. Richardson, 91 App. Div. 381, 86 N. Y. Supp. 843.

1289, n. 139. A mere constructive fraud, such as a sale by a debtor of his entire stock of merchandise in bulk without the notice to his creditors required by Laws 1902, c. 528, does not warrant an arrest. Mann v. Chrestopulos, 87 App. Div. 222, 84 N. Y. Supp. 372.

1315, n. 313. See, as contra, Lewis v. Pollack, 85 App. Div. 577, 83 N. Y. Supp. 287.

1318, n. 332. Followed in Barnes v. Goss, 98 App. Div. 1, 90 N. Y. Supp. 140.

1320, n. 344. Moving papers purporting to be based on personal knowledge, and which fail to show personal knowledge, and which state no circumstances from which the inference can fairly be drawn that an affiant has personal knowledge of the facts which he alleges, are insufficient. Price v. Levy, 93 App. Div. 274, 87 N. Y. Supp. 740.

1321, n. 356. Barnes v. Goss, 98 App. Div. 1, 90 N. Y. Supp. 140.

1324, n. 368. Where the arrest is sought under subdivision 4, i. e., where the action is based on contract with allegations of fraud, it is submitted that the complaint must be one of the moving papers, though the contrary is held in Lewis v. Pollack, 85 App. Div. 577, 83 N. Y. Supp. 287.

1351, n. 561. The delay referred to herein means more than a mere neglect to proceed. It means a positive act in the way of obstruction. The failure to serve a notice of trial or file a note of issue is not such delay since defendant's attorney could do such acts and bring the case to trial as well as plaintiff's attorney. Goff v. Charlier, 44 Misc. 28, 89 N. Y. Supp. 722.

1365, n. 664. A mere offer "to give him up" is insufficient. Garofalo v. Prividi, 43 Misc. 359, 87 N. Y. Supp. 467. In an action against a sheriff for a false return to a body execution, he may plead as a partial defense in mitigation of damages that the plaintiff and a surety were in the sheriff's office after the commencement of the action against the sureties and before the

time to answer in said action had expired; that the said sureties were then and there advised of the manner in which they could relieve themselves from further liability; and that, notwithstanding such information and advice, they wholly neglected to surrender their principal to the defendant as required by law. Prividi v. O'Brien, 46 Misc. 56, 91 N. Y. Supp. 324.

1372, n. 714. Garofalo v. Prividi, 43 Misc. 359, 87 N. Y. Supp. 467.

1373, n. 730. A recovery in excess of the amount of the undertaking may be modified on appeal. Garofalo v. Prividi, 43 Misc. 359, 87 N. Y. Supp. 467.

1386, n. 29. Time to serve summons cannot be extended so as to give jurisdiction. Jones v. Fuchs, 106 App. Div. 260, 94 N. Y. Supp. 57.

1394, n. 94. This case is affirmed in 173 N. Y. 314.

1399. The mere fact that a solvent domestic corporation is about to remove its manufacturing plant to New Jersey is not, of itself, ground. Davis v. Reflex Camera Co., 97 App. Div. 73, 89 N. Y. Supp. 587.

1407, n. 185. In an action against a firm, the fact that a warrant of attachment was obtained against two of the three defendants sued was no objection to a levy on the property of the firm, where the two defendants against whom the warrant was obtained had been served and appeared. Rogers v. Ingersoll, 103 App. Div. 490, 93 N. Y. Supp. 140.

1410, n. 204. Furthermore a firm debt to a foreign corporation cannot be attached by service of copies of the attachment on a partner residing in this state, in so far as the liability of nonresident partners is concerned. National Broadway Bank v. Sampson, 179 N. Y. 213.

1423, n. 308. Matter of Stafford, 105 App. Div. 46, 94 N. Y. Supp. 194.

1424, n. 314. Smith v. Blood, 106 App. Div. 317, 94 N. Y. Supp. 667.

1430, n. 347. This Code provision does not prevent one from estopping himself to claim property as exempt, as by becoming a surety on a bond and enumerating in the affidavit of justification the exempt property as property not exempt, he having knowledge of the exemption which was not known to those

with whom he was dealing. McMahon v. Cook, 107 App. Div. 150, 94 N. Y. Supp. 1019.

1440, n. 411. Outerbridge v. Campbell, 87 App. Div. 597, 84 N. Y. Supp. 537.

1441, n. 416. Mexico City Banking Co. v. McIntyre, 105 App. Div. 492, 94 N. Y. Supp. 157.

1442, n. 433. See, also, Box Board & Lining Co. v. Vincennes Paper Co., 45 Misc. 1, 90 N. Y. Supp. 836.

1442, n. 434. Rule applied in Austrian Bentwood Furniture Co. v. Wright, 43 Misc. 616, 88 N. Y. Supp. 142.

1446. An affidavit on information and belief that defendant has made no designation of a person on whom service of process can be made is sustained by an informal county clerk's certificate as follows: "Nothing found to December 10th, 1903, at 9 a. m." Ennis v. Untermyer, 93 App. Div. 375, 87 N. Y. Supp. 695.

1448. Where the papers do not disclose that the contract was made within the state, it is not necessary to aver compliance with the statutory condition as to a certificate procured from the secretary of state to enable a foreign corporation to sue. Box Board & Lining Co. v. Vincennes Paper Co., 45 Misc. 1, 90 N. Y. Supp. 836.

1448, n. 470. Personal knowledge of affiant was presumed in Box Board & Lining Co. v. Vincennes Paper Co., 45 Misc. 1, 90 N. Y. Supp. 836.

1449, n. 478. Lassen v. Burt, 92 N. Y. Supp. 796.

1453, n. 512. On a motion to vacate, the court has no power to amend the affidavits on which the warrant of attachment was based, to meet the objection that the warrant stated only conclusions and that these were in the alternative. Davis v. Reflex Camera Co., 97 App. Div. 73, 89 N. Y. Supp. 587.

1454, n. 516. Where the court issuing a warrant of attachment has jurisdiction, the sufficiency of the affidavit for the attachment is not questionable on collateral attack. Rogers v. Ingersoll, 103 App. Div. 490, 93 N. Y. Supp. 140.

1460, n. 560. The attachment must be signed by the plaintiff's attorney. Lassen v. Burt, 92 N. Y. Supp. 796.

1464, n. 586. A defect of this character is not jurisdictional

and does not render the attachment void. Rogers v. Ingersoll, 103 App. Div. 490, 93 N. Y. Supp. 140.

1465, n. 589. The effect of the attachment is merely to create a lien. Beardslee v. Ingraham, 106 App. Div. 506, 94 N. Y. Supp. 937.

1481, n. 697, Rule applied to levy on real property. Beardslee v. Ingraham, 106 App. Div. 506, 94 N. Y. Supp. 937.

1483, n. 708. An attachment regularly issued against a "foreign corporation" creates a right superior to the claim of a receiver appointed in the home jurisdiction, even though such receivership is prior in point of time to the levy of the attachment, if it be levied prior to the appointment of a receiver in this state. National Park Bank v. Clark, 92 App. Div. 262, 87 N. Y. Supp. 185. But where property of a corporation is placed in the hands of a receiver appointed by a court of this state, and the receiver is ordered to sell and hold the proceeds of the sale subject to incumbrances, it is proper to enjoin a sale under an attachment issued by a federal court though levied before the receivership proceedings. Beardslee v. Ingraham, 106 App. Div. 506, 94 N. Y. Supp. 937.

1492, n. 748. The sheriff's rights, under this Code section, cannot survive the attachment itself and is dependent thereon, and after such attachment has been discharged by order of the court it no longer exists, and the Code provision can no longer be invoked by the sheriff. O'Brien v. Manhattan R. Co., 45 Misc. 643, 91 N. Y. Supp. 69.

1497. In such an action, it is no defense that the warrant of attachment is voidable, where it is not void. Rogers v. Ingersoll, 103 App. Div. 490, 93 N. Y. Supp. 140.

1497, n. 780. The leave of the court to bring the action refers to the court in which the action is brought, and not to the court of which the officer who issued the warrant of attachment is a member. Rogers v. Ingersoll, 103 App. Div. 490, 93 N. Y. Supp. 140.

1507. Upon the discharge of the attachment, the sheriff has the right remaining in him to retain the property levied upon until his fees and poundage are paid (subdivision 2, § 17, c. 523, p. 940, Laws 1890, as amended by Laws 1892, p. 868, c. 418), but such right gives him no cause of action against a person in-

debted to the attachment debtor, for poundage, in the absence of special circumstances. O'Brien v. Manhattan R. Co., 45 Misc. 643, 91 N. Y. Supp. 69.

1518, n. 922. Norden v. Duke, 106 App. Div. 514, 94 N. Y. Supp. 878.

1520, n. 939. Ennis v. Untermyer, 93 App. Div. 375, 87 N. Y. Supp. 695; Van Wickle v. Weaver Coal & Coke Co., 88 App. Div. 603, 85 N. Y. Supp. 82.

1534, n. 1025. This Code provision refers only to property actually in possession of the sheriff. Where notice is served on a person indebted to the attachment debtor, but no money is paid over, and thereafter the attachment is vacated by the giving of an undertaking, the sheriff cannot sue the person indebted to the attachment debtor, to recover his fees. O'Brien v. Manhattan R. Co., 45 Misc. 643, 91 N. Y. Supp. 69.

1558, n. 11. The court will seldom grant a mandatory injunction pendente lite unless the plaintiff's right is so clear that the denial would be either captious or unconscionable. West Side Elec. Co. v. Consolidated T. & E. S. Co., 87 App. Div. 550, 84 N. Y. Supp. 1052.

1560, n. 29. See Strickland v. National Salt Co., 94 N. Y. Supp. 936.

1562, n. 40. Glascoe v. Willard, 44 Misc. 166, 89 N. Y. Supp. 791.

1562, n. 41. See Butler v. Butler, 91 App. Div. 327, 86 N. Y. Supp. 586.

1562, n. 42. Injunction against police officers to restrain picketing in front of and about plaintiff's premises refused where plaintiff's good faith and the nature of his business was not clearly shown. Craushaw v. McAdoo, 47 Misc. 420, 94 N. Y. Supp. 386.

1562, n. 48. Rule applied in refusing a temporary injunction to restrain police authorities from interfering with baseball games on Sunday. Brighton Athletic Club v. McAdoo, 47 Misc. 432, 94 N. Y. Supp. 391.

1567. In an action to restrain the sale of goods under a certain name, where the controversy grows out of the dissolution of the firm, it is proper to enjoin pendente lite the retiring partners from using such name to obtain the trade of the old firm.

Steinfeld v. National Shirt Waist Co., 99 App. Div. 286, 90 N. Y. Supp. 964.

1567, n. 93. Gillette v. Noyes, 92 App. Div. 313, 86 N. Y. Supp. 1062.

1568. See, also, Platt v. Elias, 101 App. Div. 518, 91 N. Y. Supp. 1079.

1574. Whether the application is based on section 603 or 604 of the Code, the order should not be granted except on proof that plaintiff has a cause of action. Werbelovsky v. Michael, 106 App. Div. 138, 94 N. Y. Supp. 156.

1574. In determining whether the cause of action against a foreign corporation arose within the state, the allegations of the pleadings alone may be considered. Rosenblatt v. Jersey Novelty Co., 45 Misc. 59, 90 N. Y. Supp. 816.

1574, n. 145. Gillette v. Noyes, 92 App. Div. 313, 86 N. Y. Supp. 1062.

1575, n. 149. Glascoe v. Willard, 44 Misc. 166, 89 N. Y. Supp. 791.

1583, n. 209. But where the order restrains the prosecution of an action at law, it should require the plaintiff to give the security provided for by section 611 of the Code. Werbelovsky v. Michael, 106 App. Div. 138, 94 N. Y. Supp. 156.

1584. The order can have no extraterritorial force. Rosenblatt v. Jersey Novelty Co., 45 Misc. 59, 90 N. Y. Supp. 816.

1588, n. 244. So held where labor union, its agents, servants, etc., was enjoined from interfering with non-union men. People ex rel. Stearns v. Marr, 181 N. Y. 463.

1588, n. 252. Strikers who are members of a union enjoined from doing certain acts may be punished for disobedience of the injunction though it was not personally served on them. People ex rel. Stearns v. Marr, 181 N. Y. 463.

1604, n. 384. Compare City of New York v. Brown, 179 N. Y. 303.

1604, n. 386. McGown v. Barnum, 42 Misc. 585, 87 N. Y. Supp. 605.

1605, n. 391. McGown v. Barnum, 42 Misc. 585, 87 N. Y. Supp. 605. A discontinuance on stipulation, and the vacation of the injunction pursuant to such stipulation, does not, however, constitute an adjudication that plaintiff was not entitled

to the injunction. Freifeld v. Sire, 96 App. Div. 296, 89 N. Y. Supp. 260.

1607, n. 402. That order is an order in an action and not in a special proceeding was the ground on which the appeal was dismissed in Keator v. Dalton, 171 N. Y. 650, without opinion. The case of Lawton v. Green, 64 N. Y. 326, is to the contrary.

1612, n. 455. It is immaterial that the injunction was vacated on the return of an order to show cause why the temporary injunction granted by such order should not be continued pendente lite. Perlman v. Bernstein, 93 App. Div. 335, 87 N. Y. Supp. 862.

1613, n. 456. See, as contra, McGown v. Barnum, 42 Misc. 585, 87 N. Y. Supp. 605.

1614, n. 468. Perlman v. Bernstein, 93 App. Div. 335, 87 N. Y. Supp. 862.

1634, n. 89. This Code section also applies to a receiver appointed in a matrimonial action. Matter of Spies, 92 App. Div. 175, 86 N. Y. Supp. 1043.

1635, n. 95. But the failure of the order to require a bond does not excuse the refusal to deliver over property to the receiver. Matter of Spies, 92 App. Div. 175, 86 N. Y. Supp. 1043.

1641, § 1257. Compare Foster v. Foster, 98 App. Div. 24, 90 N. Y. Supp. 451, as to duty of receiver to surrender possession.

1641, n. 132. The same rule applies where an attachment is issued out of a federal court. Beardslee v. Ingraham, 106 App. Div. 506, 94 N. Y. Supp. 937.

1647, n. 182. Leave to sue may be granted nunc pro tunc. De La Fleur v. Barney, 45 Misc. 515, 92 N. Y. Supp. 926.

1654, n. 238. Sureties must have had notice of the accounting. Stratton v. City Trust, etc. Co., 86 App. Div. 551, 83 N. Y. Supp. 780.

1655, n. 244. The payment of brokerage for procuring a receiver's bond is not a lawful charge as an expense of the receivership, since not a sum paid to his surety under section 3320 of the Code. Adams v. Elwood, 104 App. Div. 138, 93 N. Y. Supp. 327. Where an order appointing a receiver authorized him to reduce to his possession sufficient property to pay plaintiff's claim as it should eventually be established, the receiver

should be allowed the five per cent commission computed on the total value of the property acquired by him in endeavoring to discharge his duty in good faith, although that property proved to be more than was in the end actually required to satisfy the judgment recovered. Id.

1661. Section 474 of the Code was amended by Laws 1904, c. 747, by adding the following clause: "The appellate division of each department may provide by rule for the manner of taking up calendars in each county embraced within the department; and for the classification for the the purposes of trial, of actions placed on such calendars; and may also provide for the making up of two or more calendars within such classification."

1662. Where a case was noticed for trial pending an appeal from the overruling of a demurrer to the answer, and before the case was reached on the day calendar the appellate court modified the interlocutory judgment and granted plaintiff leave to reply, and a reply was thereupon served, the right of defendants to retain the case on the calendar or to move for trial pursuant to their original notice of trial was terminated, and a new notice of trial and note of issue required. Ward v. Smith, 103 App. Div. 375, 92 N. Y. Supp. 107, reversing 45 Misc. 169, 91 N. Y. Supp. 905.

1663, n. 8. To same effect, Muglia v. Erie R. Co., 97 App. Div. 532, 90 N. Y. Supp. 216.

1665, n. 20. Notice of trial cannot be served before the service of the complaint. Sanders v. People's Co-Op. Ice Co., 44 Misc. 171, 89 N. Y. Supp. 785. That notice cannot be served, before joinder of issue, though order provides that date of issue be of a date prior to the actual service of the answer, see Muglia v. Erie R. Co., 97 App. Div. 532, 90 N. Y. Supp. 216.

1666, n. 28. Followed in Ward v. Smith, 45 Misc. 169, 91 N. Y. Supp. 905, which is reversed, on another point, in 103 App. Div. 375, 92 N. Y. Supp. 1107. It seems that the right to move to strike a case from the calendar because notice of trial was filed prior to the joinder of issue is waived where the objecting party also noticed the case for trial at the same term of court (Muglia v. Erie R. Co., 97 App. Div. 532, 90 N. Y. Supp. 216),

though it has also been held that service before joinder of issue is a nullity and not waived by the failure to return the notice. Sanders v. People's Co-Op. Ice Co., 44 Misc. 171, 89 N. Y. Supp. 785.

1668, § 1278. Of course the note of issue cannot be filed until after the case is noticed for trial. McMann v. Brown, 92 App. Div. 249, 87 N. Y. Supp. 38. But the filing of a note of issue before service of a notice of trial, where both are done on the same day, is not ground for striking the cause from the calendar. Lederer v. Adler, 44 Misc. 217, 88 N. Y. Supp. 1010.

1670, § 1280. In the first judicial district a case may be passed where counsel is engaged in the trial of another case. Spero v. Supreme Council, A. L. H., 95 App. Div. 499, 88 N. Y. Supp. 989.

1672, n. 59. The Code provision only applies where the instrument sued on shows on its face that the plaintiff is entitled to the amount sought to be recovered. Tautphoeus v. Harbor & S. Bldg. & Sav. Ass'n, 96 App. Div. 23, 88 N. Y. Supp. 709.

1677, n. 75. The pleadings, however, where a part of the motion papers, are sufficient to show that the action is against an administratrix in her official capacity. Jackson v. Jackson, 44 Misc. 44, 89 N. Y. Supp. 715.

1678, subd. 8. Rule applies to action against foreign corporations as well as to actions against domestic corporations. Martin's Bank v. Amazonas Co., 98 App. Div. 146, 90 N. Y. Supp. 734.

1687. The 1904 amendment, as set forth herein, was held unconstitutional in Riglander v. Star Co., 98 App. Div. 101, 90 N. Y. Supp. 772, as depriving the judiciary of the right to regulate the hearing of preferred causes according to the circumstances of each particular case, and as tending to deprive litigants of their property without due process of law. It follows that the granting of the motion now is discretionary, subject to the rules laid down in the text.

1687, n. 120b. Followed in Carroll v. Pennsylvania Steel Co., 96 App. Div. 165, 89 N. Y. Supp. 199.

1687, n. 120c. Followed in Carroll v. Pennsylvania Steel Co., 96 App. Div. 165, 89 N. Y. Supp. 199. Same rule applies

since the 1904 amendment of the Code has been declared unconstitutional. Martin's Bank v. Amazonas Co., 98 App. Div. 146, 90 N. Y. Supp. 734. It is held that this rule does not apply to the "special term" calendar. Jackson v. Jackson, 44 Misc. 44, 89 N. Y. Supp. 715.

1690 to 1701. Where one after the other, a motion made for leave to amend by setting up a counterclaim is denied for laches, defendant sues on the counterclaim, the verdict in the original action is reversed on appeal, defendant moves to amend by setting up the counterclaim and for leave to discontinue the independent action brought by him, the consolidation of the two actions is properly refused. A. & S. Henry & Co. v. Talcott, 89 App. Div. 76, 85 N. Y. Supp. 98.

1696. A consolidation is properly refused, after the removal of an action from the municipal to the city court of New York, where it will prejudice the plaintiff in an attempt to enforce bonds given on the removal. Gray Lithograph Co. v. Schulman, 84 N. Y. Supp. 503.

1704, n. 14. Walsh v. Empire Brick & Supply Co., 90 App. Div. 500, 85 N. Y. Supp. 528.

1708, n. 43. If plaintiff's attorney, by mistake enters judgment against one of the defendants "jointly" liable who was also in default, the court may relieve the plaintiff from such mistake by vacating the judgment as to the defendant jointly liable. Weston v. Citizens' Nat. Bank, 88 App. Div. 330, 84 N. Y. Supp. 743.

1720. Testimony of third person may be perpetuated. Matter of Tweedie Trad. Co., 105 App. Div. 426, 94 N. Y. Supp. 167.

1722, n. 33d. In commenting on this Code subdivision, Laughlin, J., in Hebron v. Work, 101 App. Div. 463, 92 N. Y. Supp. 149, remarks as follows: "These sections should be revised to harmonize with the changes made in the law by the Legislature and to conform clearly to the construction placed thereon by the courts, to the end that new beginners may not be obliged to devote days of study to ascertain the correct practice in obtaining the examination of a party or a witness, and that the old practitioners and the courts may not be misled when required to act without much time for examination or reflection."

1723. It is not necessary to expressly state that the applicant intends to read, on the trial, the testimony taken. Jacobs v. Mexican Sugar Refining Co., 45 Misc. 56, 90 N. Y. Supp. 824.

1723, n. 37. Jacobs v. Mexican Sugar Refining Co., 45 Misc. 56, 90 N. Y. Supp. 824.

1727, n. 52. Meres v. Emmons, 103 App. Div. 381, 92 N. Y. Supp. 1099. The Code exception to this rule where the deposition is "that of a party taken at the instance of an adverse party" applies to a deposition taken by a co-party, where their interests are hostile. Hetzel v. Easterly, 96 App. Div. 517, 533, 89 N. Y. Supp. 154.

1734, n. 85. Affidavit on information and belief, without stating sources of information, is insufficient. Fox v. Peacock, 97 App. Div. 500, 90 N. Y. Supp. 137.

1735, n. 97. If made by attorney, the reason why it was not made by the party must be stated. It is not sufficient to aver that the party is a nonresident. Fox. v. Peacock, 97 App. Div. 500, 90 N. Y. Supp. 137.

1735, n. 98. The statement in the text that "the application for a commission may be made at any time within twenty days after the joinder of issue" is misleading in so far as the present practice is concerned. By the Code (§§ 888, 908,) the application may be made before joinder of issue or even after judgment, in some cases. "There can be no question but that the court has power to issue a commission at any time before the case is finally decided," where the application is made after the joinder of an issue of fact, to obtain material testimony in the prosecution or defense of the action. Mercantile Nat. Bank v. Sire, 100 App. Div. 459, 91 N. Y. Supp. 418.

1735, n. 99. Valentine v. Rose, 45 Misc. 342, 90 N. Y. Supp. 389.

1750, n. 176. The reasons why an "oral" examination is necessary must be shown by affidavits. Woodward v. Skinner, 92 N. Y. Supp. 259.

1752, § 1345. In Gowans v. Jobbins, 91 N. Y. Supp. 842, the order was required to provide that the actual expenses incurred by one of the attorneys for the plaintiffs in attending the ex-

aminations before the commissioners of the witnesses produced on behalf of the defendant be paid by the defendant, and also a per diem allowance, not exceeding $20, for the time such attorney is necessarily absent from home, attending such examinations. Said expenses and allowance to be taxed before a justice of the supreme court on three days' notice. The payment thereof to be made within 10 days after said taxation. The defendant to deposit, as designated in the order, a sufficient sum, stated therein, to cover the expenses and allowance to such attorney, or to give satisfactory security therefor, within 10 days after service of a copy of the order, together with the notice of entry thereof. In lieu of the examination of said witnesses by open commission, the defendant was permitted, at her election, made within 20 days thereof, to examine said witnesses on written interrogatories to be annexed to the commissions to be issued, conforming to the practice prescribed in such cases.

1764, n. 278. Under this Code provision, where the party taking the deposition reads the testimony taken on the direct examination, but the other party refuses to read the testimony taken on the cross-examination whereupon it is read by the former, the latter may object to any question as irrelevant or incompetent though a part of his own cross-examination. Cudlip v. New York Evening Journal Pub. Co., 180 N. Y. 85.

1767, n. 300. Cudlip v. New York Evening Journal Pub. Co., 180 N. Y. 85.

1773, n. 331. A second subpoena will not, it seems, be vacated on the ground that it was irregular to issue it without notice to all the opposing parties, since such question may be raised in the court of the state in which the action is pending. Matter of Shawmut Min. Co., 94 App. Div. 156, 87 N. Y. Supp. 1059.

1774. That attorney need not, on his examination, disclose the names of his clients, see Matter of Shawmut Min. Co., 94 App. Div. 156, 87 N. Y. Supp. 1059.

1780. Insert, in the eleventh line from the top, after the word "necessity," the clause "where the application is made before the joinder of issue." Where the cause of action is

in equity for an accounting, it is unnecessary to examine one of the defendants before trial to ascertain the condition of the account. Louda v. Revillon, 99 App. Div. 431, 91 N. Y. Supp. 194. Order to examine to show prostitution of defendant granted in action to enjoin defendant from holding herself out as plaintiff's wife, as against objection that the matters as to which the examination was sought were irrelevant and immaterial to the issues in the action. Bell v. Clarke, 45 Misc. 272, 92 N. Y. Supp. 163.

1780, n. 370. An examination to ascertain facts which may be found in public statutes and ordinances, and in public offices, will not be granted. Muldoon v. New York Cent. & H. R. R. Co., 98 App. Div. 169, 91 N. Y. Supp. 65.

1780, n. 371. That a "party" cannot be examined before action brought, except for the sole purpose of perpetuating testimony, is held in In re Schlotterer, 105 App. Div. 115, 93 N. Y. Supp. 895, but such holding, inasmuch as it practically overrules a long list of cases in which the examination has been allowed to frame the complaint, is of doubtful authority, and it is questionable whether it will be followed.

1781, n. 376. See, also, Edelstein v. Goldfield, 92 N. Y. Supp. 243.

1781, n. 380. McCormack v. Coddington, 98 App. Div. 13, 90 N. Y. Supp. 218. Especially is this so where the information can be obtained on the trial from witnesses other than parties to the action. Knight v. Morgenroth, 93 App. Div. 424, 87 N. Y. Supp. 693. An examination before any action is brought will not be ordered where the purpose thereof is to ascertain whether the applicant has a cause of action against persons not named. Ellett v. Young, 95 App. Div. 417, 88 N. Y. Supp. 661.

1783, n. 388. Muldoon v. New York Cent. & H. R. R. Co., 98 App. Div. 169, 91 N. Y. Supp. 65.

1785. An examination should not be ordered, in an action between partners where the evidence sought to be obtained is not material to the main issue but will only become material on an accounting if plaintiff succeeds on the main issue. Hausling v. Rheinfrank, 103 App. Div. 517, 93 N. Y. Supp. 121, and cases cited.

1786, n. 405. Whether proposed examination was material to the issues was the only point decided in McDonald v. Morse, 96 App. Div. 406, 89 N. Y. Supp. 176.

1786, § 1381. In an action for an accounting, the fact that a trial of the issues prior to the interlocutory judgment will result in disclosing to the court all of the facts necessary for a final judgment is not a reason for refusing to allow an examination of the defendant as to all matters material on the trial of such issues. Griffen v. Davis, 99 App. Div. 65, 90 N. Y. 491.

1790, § 1384. The application may be denied because of laches. Whitney v. Rudd, 100 App. Div. 492, 91 N. Y. Supp. 429.

1790, n. 430. A deposition of a party cannot be taken, at his own instance, "during the trial," for a cause existing and known to the party and his counsel prior to the commencement thereof. Hebron v. Work, 101 App. Div. 463, 92 N. Y. Supp. 149.

1791, § 1385. A federal circuit court in the state of New York cannot make an order for the examination of a party before trial before a master or commissioner appointed pursuant to section 870 of the Code of Civil Procedure. Hanks Dental Ass'n v. International Tooth Crown Co., 194 U. S. 303.

1800, n. 491. McCormack v. Coddington, 98 App. Div. 13, 90 N. Y. Supp. 218. An order for the examination of a party before trial, after joinder of issue, cannot be obtained unless it fairly appears from the moving papers that it is intended to use the evidence upon the trial. Whitney v. Rudd, 100 App. Div. 492, 91 N. Y. 429.

1803, n. 509. In an action for an accounting, the order may require an examination as to all matters material to the issue. Griffen v. Davis, 99 App. Div. 65, 90 N. Y. Supp. 491.

1804, n. 516. Boyle v. Consolidated Gas. Co., 46 Misc. 191, 94 N. Y. Supp. 27.

1804, n. 517. Matter of Thompson, 95 App. Div. 542, 89 N. Y. Supp. 4; Matter of Sands, 98 App. Div. 148, 90 N. Y. Supp. 749. A corporation ought not to be required to produce its books, upon the examination of one of its officers before trial, to enable him to refresh his memory therefrom while on the stand, unless he requires their assistance in order to testify

concerning the matters in regard to which he is to be examined. Bruen v. Whitman Co., 106 App. Div. 248, 94 N. Y. Supp. 304.

1805, n. 520. The officer of the corporation cannot refuse to obey the order to produce the books to refresh his memory, on the ground that they may tend to incriminate him. Pray v. C. A. Blanchard Co., 95 App. Div. 423, 88 N. Y. Supp. 650.

1805, n. 521. The affidavit must go further than to show a necessity that the books be produced. It must, primarily, show that the examination of the person sought to be examined is material and necessary. Matter of Thompson, 95 App. Div. 542, 89 N. Y. Supp. 4.

1806, n. 525. An order of examination should be vacated where it directs the examination to take place four days after the granting thereof, without stating any reason for a notice of less than five days. Osborn v. Barber, 105 App. Div. 236, 93 N. Y. Supp. 833.

1815. A deposition of a party taken by his co-party may be read in evidence though the former is present at the trial. Hetzel v. Easterly, 96 App. Div. 517, 533, 89 N. Y. Supp. 154.

1817. As stated in volume 2, the Code provision for a physical examination applies only to actions for personal injuries, and hence in other actions the application must be based on the inherent power of the court. In Gore v. Gore, 103 App. Div. 168, 93 N. Y. Supp. 396, the power to require an examination in an action to annul a marriage on the ground of impotency, is reiterated, but it is held that the order should not direct the deposition of the examining physicians to be taken out of court and before trial. Parker, P. J., in the opinion, makes the following statements: " I can discover no reason why a referee should be appointed to conduct the proceeding under which such examination is had, or to take, by way of depositions, the evidence, or any part of the evidence, bearing upon that question. An order can be made that the defendant submit to such an examination to be taken upon and as a part of the trial, and the evidence of the surgeons can also be taken as a part of such trial, and before the court. And while I would not hold that a reference may not, in any instance, be ordered, at which such evidence may be taken, I am of the opinion that it should never be done unless peculiar circumstances clearly require it."

1820, n. 12. Landau v. Citron, 47 Misc. 354, 93 N. Y. Supp. 1111.

1830, n. 28. See, also, Cohn v. Hessel, 95 App. Div. 548, 88 N. Y. Supp. 1057.

1832, n. 38. An order should not be granted under this Code provision where it is not shown that the moving party is ignorant of the facts proposed to be discovered, nor where access to the land was offered by the adverse party who imposed reasonable conditions. Sutter v. City of N. Y., 89 App. Div. 494, 85 N. Y. Supp. 989.

1838, n. 65. So where, in an action for breach of contract, defendant alleges the making of a new written contract, and plaintiff shows that he has no knowledge of the new contract, it is improper to refuse to plaintiff an order for inspection. Moore v. Encyclopaedia Brittannica Co., 43 Misc. 618, 88 N. Y. Supp. 133.

1842, n. 96. This rule, however, does not apply where the right to inspect is created by contract. Fidelity & Casualty Co. v. Seagrist, 79 App. Div. 614, 617, 80 N. Y. Supp. 227; Martin v. New Trinidad Lake Asphalt Co., 87 App. Div. 472, 84 N. Y. Supp. 711; Vallenberg v. Wahn, 103 App. Div. 34, 92 N. Y. Supp. 830.

1843, n. 100. These cases do not apply where the right to inspection is created by contract. Vallenberg v. Wahn, 103 App. Div. 34, 92 N. Y. Supp. 830.

1845, § 1447. The motion will not be granted where based on an affidavit instead of a petition. Lee v. Winans, 99 App. Div. 297, 90 N. Y. Supp. 960.

1848, n. 131. Dannenberg v. Heller is reported in the official series in 88 App. Div. 548.

1853. A party should not be compelled to produce a writing for inspection, at a photographer's studio, so that it may be photographed. The better practice is to direct that it be placed in the custody of the county clerk with permission to inspect and photograph it. Beck v. Bohm, 95 App. Div. 273, 88 N. Y. 584. Where the party whose books are desired to be inspected claims that the discovery is sought in bad faith, for ulterior purposes, the court should not direct that the inspection be

conducted by plaintiff with the aid of a chartered accountant, and that the "defendants" pay the charges of the accountant. Cohn v. Hessel, 95 App. Div. 548, 88 N. Y. Supp. 1057.

1853, n. 156. Books of account, in daily use, which cannot be taken from the place of business without serious inconvenience, should not be ordered deposited with a referee, but the inspection should be permitted at the place of business. Cohn v. Hessel, 95 App. Div. 548, 88 N. Y. Supp. 1057.

1860. It must appear that the claim made by the person not a party has some reasonable foundation. Hanna v. Manufacturer's Trust Co., 104 App. Div. 90, 93 N. Y. Supp. 304.

1860, n. 12. Where facts exist which would support a common-law action for interpleader, the Code substitute is proper. Helene v. Com. Exch. Bank, 96 App. Div. 392, 89 N. Y. Supp. 310.

1860, n. 15. Michigan Sav. Bank v. Coy, Hunt & Co., 45 Misc. 40, 90 N. Y. Supp. 814.

1862, n. 30. But where a third person interposes a claim, in replevin, and defendant makes no claim whatever to the property, an interpleader will be granted but no direction will be made as to the disposition of the property pending the action where it is in the possession of the plaintiff pursuant to an undertaking given by him. Wright Steam Engine Works v. N. Y. Kerosene Oil Engine Co., 44 Misc. 580, 90 N. Y. Supp. 130.

1865, n. 50. Lane v. Equitable Life Assur. Soc., 102 App. Div. 470, 92 N. Y. Supp. 877. By interpleading an adverse claimant, the company eliminates all question as to the validity of the policy and the designation of the beneficiary. Sanguinitto v. Goldey, 88 App. Div. 78, 84 N. Y. Supp. 989.

1865, n. 55. This statute has no application where persons claiming the funds in litigation have only a future interest and not a present right to the funds. Gifford v. Oneida Sav. Bank, 99 App. Div. 25, 90 N. Y. Supp. 693. The city court of New York may grant the order. Gottschall v. German Sav. Bank, 45 Misc. 27, 90 N. Y. Supp. 896.

1866, § 1459. Where the motion, made before issue joined, is granted but no order finally adjudicating the motion is entered, it is questionable whether defendant's time to plead is

not suspended. Michigan Sav. Bank v. Coy, Hunt & Co., 45 Misc. 40, 90 N. Y. Supp. 814.

1868. The Code nowhere prescribes the procedure to be followed after the entry of an order of interpleader. It is, however, now well settled that such procedure should, as far as practicable, be that adopted by courts of equity in cases of interpleader in analogous cases. Leave to serve a supplemental complaint should be sought as provided for by section 544 of the Code. The supplemental complaint should contain substantially the allegations of the former complaint, and such further allegations as may be necessary to show the facts preceding the making of the order of interpleader, showing the substitution of the present defendant in place of the original defendant, and the latter's discharge from liability upon his deposit in court of the amount of the debt or the delivery of the property, and the compliance with all the provisions of the order of interpleader. The complaint should also demand judgment that the plaintiff is entitled to the amount so deposited or the property specified in the complaint, and that he recover the costs of the action. Within the time prescribed by law to answer a complaint, the subtituted defendant should answer the supplemental complaint, and thus present the issues to be tried. If the substituted defendant fails to plead or to obtain an extension of the time to plead, plaintiff may enter judgment and apply to the court for an order directing the payment to him of the money on deposit. Greenblatt v. Mendelsohn, 92 N. Y. Supp. 963. Consent of the substituted defendant to the granting of the order of interpleader is an appearance and submission to the jurisdiction of the court which makes the service of a summons unnecessary. Id. Objections to the service of a supplemental complaint without leave of court are waived by admitting "due and timely service" thereof. Id.

1869. The court, on discharging an insurance society from liability for the proceeds of a policy, claimed by several persons, on its payment of such proceeds into court, should not award costs to such society, to be deducted from such proceeds. Lane v. Equitable Life Assur. Soc., 102 App. Div. 470, 92 N. Y. Supp. 877.

1869, n. 79. Vandewater v. Mutual Reserve Life Ins. Co., 44 Misc. 316, 89 N. Y. Supp. 845. The case of Wells v. Corn Exch. Bank is reported in 43 Misc. 377. This case is followed in Marcus v. Aufses, 94 N. Y. Supp. 397, and Krugman v. Hanover Fire Ins. Co., 94 N. Y. Supp. 399, which hold that inasmuch as the granting of the motion in the city court of New York City would oust said court of jurisdiction, because it has no jurisdiction over equitable actions, the motion should be refused. The latter case follows the rule under protest and presents good reasons why the contrary rule should prevail.

1870, § 1463. See, also, Helene v. Corn Exch. Bank, 96 App. Div. 392, 89 N. Y. Supp. 310.

1874, n. 17a. The last two cases cited in the note, which are contrary to the rule laid down in the text, are followed in Larsen v. Interurban St. R. Co., 97 App. Div. 150, 89 N. Y. Supp. 649, which holds that there is no distinction between cases where the guardian ad litem is the father and those where some other person has been appointed to act.

1875. Consent of attorney to act without compensation must be one of the motion papers. Traver v. Jackman, 98 App. Div. 287, 90 N. Y. Supp. 739.

1875, nn. 22, 25. Traver v. Jackman, 98 App. Div. 287, 90 N. Y. Supp. 739.

1878, n. 46. The attorney is entitled, however, to the statutory costs, and hence a consent to act "without compensation except the statutory costs" is sufficient. Malkin v. Postal Typewriter Co., 95 App. Div. 205, 88 N. Y. Supp. 403.

1884, n. 12. Where a plaintiff has already given a bond in replevin under section 1699 of the Code he cannot be compelled to give an additional undertaking to secure the costs. Vulcanite Portland Cement Co. v. Williams, 92 N. Y. Supp. 574.

1884, n. 13. That parties who intervene as defendants cannot be compelled to give security for costs, see Riley v. Ryan, 45 Misc. 151, 91 N. Y. Supp. 952.

1885, n. 18. Whether the word "city," as used in reference to New York City, means the entire city as now constituted or the original city as it existed prior to the last consolidation, quere. Pelz v. Roth, 92 N. Y. Supp. 263.

1886. The mere fact of being out of the state temporarily does not constitute the person a nonresident. Thus, where the plaintiff was domiciled in this state at the time of the commencement of the action and for a considerable prior period, having a residence in Brooklyn, but for a few weeks, in order to receive care for her injuries, she had been stopping temporarily with an uncle in Jersey City, and such sojourn included the date when the action was commenced, but her household effects remained at her residence in Brooklyn, and she had returned to actually live in Brooklyn before the determination of the motion, she was not a nonresident. Taylor v. Norris, 104 App. Div. 21, 93 N. Y. Supp. 356.

1893, n. 79. It is necessary, in addition to the fact of insolvency, to show that the action was brought in bad faith or heedlessly, or that the plaintiff will probably not succeed. De La Fleur v. Barney, 45 Misc. 515, 92 N. Y. Supp. 926.

1897, n. 99. The right to demand security is not waived by answering the complaint without moving therefor, where afterwards the complaint and summons is amended so as to change the action to one against defendant personally instead of as trustee. Boyd v. United States Mortg. & Trust Co., 90 App. Div. 32, 85 N. Y. Supp. 589.

1897, n. 100. The motion may be denied for laches where not made until a year and a half after service of the complaint, though made before answering, where, in the interim, the defendant's time to answer has repeatedly been enlarged by successive stipulations, and when the condition which would have entitled the defendant to security, if he had moved promptly, no longer exists. Gibbons v. Bush Co., 98 App. Div. 283, 90 N. Y. Supp. 603.

1900, n. 121. An affidavit that plaintiff had no office within the limits of the borough of Manhattan, without referring to the borough of the Bronx, is insufficient. Pelz v. Roth, 92 N. Y. Supp. 263.

1912, n. 17. Ingrosso v. Baltimore & O. R. Co., 105 App. Div. 494, 94 N. Y. Supp. 177.

1915, n. 40. The stay does not begin to operate until the order has been served on the party required to pay the costs, irrespective of whether the time for the payment of such costs

is specified in the order. Sire v. Shubert, 93 App. Div. 324, 87 N. Y. Supp. 891. Where the county court reverses, with costs, a judgment for plaintiff, and grants a new trial before a designated justice of the peace, this Code provision does not apply so as to preclude a new trial before the payment of the costs of reversal. Smith v. Cayuga Lake Cement Co., 105 App. Div. 307, 93 N. Y. Supp. 959. Failure to pay the costs of a reversal, where not imposed as the condition of granting a new trial, but entered as a part of the judgment, is not a ground for a stay. Id.

1915, n. 45. Entry of order and an appeal therefrom are not stayed by the failure to pay the costs. Allen v. Becket, 84 N. Y. Supp. 1011.

1915, n. 46. Jacobs v. Mexican Sugar Refining Co., 45 Misc. 56, 90 N. Y. Supp. 824.

1915, n. 47. Costs of an appeal from an order are "costs of a motion." Wasserman v. Benjamin, 91 App. Div. 547, 86 N. Y. Supp. 1022; Cohen v. Krulewitch, 81 App. Div. 147, 80 N. Y. Supp. 689.

1916. The inherent power of the court to stay proceedings or control the trial of an action is one which must be exercised in the action itself, and, where it is sought to enjoin parties from proceeding in another action, such relief must be by injunction in an action where by formal prayer it is demanded. It is not permissible to apply in an action brought for an entirely different purpose, to stay the trial of another action. David Belasco Co. v. Klaw, 98 App. Div. 74, 90 N. Y. Supp. 593. That plaintiffs in the second action who were defendants in the original action could have set up their cause of action as a counterclaim in the first action does not require the granting of a stay. Jones v. Leopold, 95 App. Div. 404, 88 N. Y. Supp. 568; Ogden v. Pioneer Iron Works, 91 App. Div. 394, 86 N. Y. Supp. 955.

1918, n. 64. A stay should not be granted where the actions are between different parties, for different causes, and the determination of one will not dispose of the other. Jenkins v. Baker, 91 App. Div. 400, 86 N. Y. Supp. 958.

1921. Application should be based on notice. Delahunty v. Canfield, 106 App. Div. 386, 94 N. Y. Supp. 815.

1930, § 1487. On a motion by defendant to change the place

of trial to the county in which he resides, where the venue is laid in a county in which neither party resides, it is improper, against defendant's objections to change the place of trial to the county of plaintiff's residence. Ferrin v. Huxley, 94 App. Div. 211, 87 N. Y. Supp. 1005. The trial should not be changed to a county in which neither of the parties nor any of witnesses reside unless the circumstances are so unusual that the ends of justice so require. Kavanaugh v. Mercantile Trust Co., 94 App. Div. 575, 88 N. Y. Supp. 113.

1933, n. 34. See, also, Pattison v. Hines, 105 App. Div. 282, 93 N. Y. Supp. 1071.

1934, n. 40. Church v. Swigert, 99 App. Div. 273, 90 N. Y. Supp. 939; Groff v. Rome Metallic Bedstead Co., 98 App. Div. 152, 90 N. Y. Supp. 691.

1935, n. 41. Woolworth v. Klock, 92 App. Div. 142, 86 N. Y. Supp. 1111.

1936, n. 51. But while the rule is that the convenience of parties and of expert witnesses will not be consulted, yet there is a class of expert witnesses that form an exception to the rule, and such are those who may testify to the value of property from personal knowledge, as distinguished from those who give their opinions on an assumed state of facts. Groff v. Rome Metallic Bedstead Co., 98 App. Div. 152, 90 N. Y. Supp. 691.

1936, n. 53. Quinn v. Brooklyn Heights R. Co., 88 App. Div. 57, 84 N. Y. Supp. 738; Hirshkind v. Mayer, 91 App. Div. 416, 86 N. Y. Supp. 836. Action should not be changed to county adjacent to New York county, in the absence of special circumstances. Kavanaugh v. Mercantile Trust Co., 94 App. Div. 575, 88 N. Y. Supp. 113.

1936, n. 54. The venue has been changed to the city of New York from the county of Lewis, in which the action was brought, where defendant had seven material witnesses residing in such city, and plaintiff was the only material witness residing in the county of Lewis. Larocque v. Conhaim, 45 Misc. 234, 92 N. Y. Supp. 99.

1942, n. 77. The fact that the demand is served at the same time that defendant interposes a demurrer, and that thereafter the demurrer is overruled with leave to answer over, is imma-

terial. Washington v. Thomas, 103 App. Div. 423, 92 N. Y. Supp. 994.

1945, n. 93. Bell v. Polymero, 99 App. Div. 303, 90 N. Y. Supp. 920.

1947, n. 105. After a trial resulting in a disagreement of the jury, a motion will not be granted, in the absence of exceptional reasons therefor. Haines v. Reynolds, 95 App. Div. 275, 88 N. Y. Supp. 589. Where both parties notice the case for trial and defendant appears at the term for which the case is noticed and obtains a postponement on account of the illness of a witness, he cannot thereafter move for a change for the convenience of witnesses. Coleman v. Hayes, 92 App. Div. 575, 87 N. Y. Supp. 12.

1947, n. 111. Lindsley v. Sheldon, 43 Misc. 116, 88 N. Y. Supp. 192.

1949. Where both parties act on the assumption that the county named in the summons is the place of trial, the mere fact that through inadvertence the county named in the complaint differs from that named in the summons does not change the place of trial. Bell v. Polymero, 99 App. Div. 303, 90 N. Y. Supp. 920.

1950, n. 126. Followed in Ferrin v. Huxley, 94 App. Div. 211, 87 N. Y. Supp. 1005.

1952. The residence of the parties should be stated as of the time of the commencement of the action. Burke v. Frenkel, 97 App. Div. 19, 89 N. Y. Supp. 621.

1968. After a determination that plaintiff is not entitled to an inspection of defendant's books, and a subpoena duces tecum against defendant to produce his books so that he can, by reference to them, answer questions pertinent to the inquiry, defendant cannot be compelled to answer a question which requires him to give entries in the book. Franklin v. Judson, 99 App. Div. 323, 91 N. Y. Supp. 100.

1974, n. 40. Cited in People v. Mills, 178 N. Y. 283, 287, 308, which was a criminal case.

1996. The offer and acceptance constitute a contract and are to be construed according to the condition of the pleadings at the time the offer was made. Construction of offer in a suit for specific performance, see Abel v. Bischoff, 99 App. Div. 248, 90 N. Y. Supp. 990.

1999, n. 81. In McNally v. Rowan, 101 App. Div. 342, 92 N. Y. Supp. 250, the court states that the case cited in this note is not the law since the amendment of the mechanics' lien law in 1885 by permitting a personal judgment where the lien is not established. It follows that where the offer of judgment is merely for a sum of money, a judgment, though for a less sum, where a lien directed to be enforced by a sale of the premises and a deficiency judgment, if necessary, is more favorable to plaintiff.

2000, nn. 85, 87. Where a plaintiff recovered a judgment for a few cents less than the offer made before answering, but the judgment extinguished a counterclaim for twenty-five dollars which would not have been extinguished had the offer of judgment been accepted, the judgment recovered is more favorable than the offer. Smith v. Sheldon, 94 App. Div. 497, 87 N. Y. Supp. 1099.

2013. The court has power to relieve a defendant from the effect of a tender which, after the commencement of the action, is, by order, paid into court, where the court has permitted the defendant to amend his answer by withdrawing his admission of any indebtedness to the plaintiff and by setting up a counter-claim and demanding an affirmative judgment. Mann v. Sprout, 102 App. Div. 60, 92 N. Y. Supp. 372.

2022, n. 37. The check or draft must be drawn in precise accordance with the order of court, or the trust company may refuse to pay it. So held where representative character of payees was not as fully described in check as in order of court. Holt v. Colonial Trust Co., 97 App. Div. 305, 89 N. Y. Supp. 955.

2024, n. 2. Where an offer of foreign records to prove a material fact in issue was rejected because of the failure to prove the foreign law under which such records were kept, the court should not refuse an application to withdraw a juror on the ground of surprise. Pirrung v. Supreme Council of Catholic Mut. Ben. Ass'n, 104 App. Div. 571, 93 N. Y. Supp. 575.

2025, n. 7. Where defendant in a personal injury case was entitled to presume that a second trial of the action would be on the same theory as the first, and plaintiff was allowed to amend his complaint on the second trial by stating a different

ground of negligence, the court should permit a continuance to enable defendant to procure new witnesses. McDonald v. Holbrook, C. & D. Contracting Co., 105 App. Div. 90, 93 N. Y. Supp. 920.

2026, n. 18. Hosman v. Kinneally, 43 Misc. 76, 86 N. Y. Supp. 263.

2026, n. 19. See, also Faist v. Metropolitan St. R. Co., 89 App. Div. 593, 85 N. Y. Supp. 646.

2026, nn. 18, 30. In the absence of proof of surprise, the denial of an application to adjourn for the purpose of calling another witness, made near the close of defendant's testimony, is not an abuse of discretion. Block v. Sherry, 43 Misc. 342, 87 N. Y. Supp. 160.

2031, n. 55. Where a party considers that the terms imposed as a condition of granting his request for a postponement are onerous and unsatisfactory, he should decline to accept the order on the terms imposed, and proceed with the trial. Rawson v. Silo, 105 App. Div. 278, 93 N. Y. Supp. 416. After the trial of an action has commenced, and one of the parties asks to be allowed to withdraw a juror and have the trial postponed for the term, it is not an abuse of discretion for the court to require, as a condition of granting the request, that the party making the request pay to his opponent a term fee, a trial fee, and the witnesses' fees of the term. Id.

2039, n. 9. Notice of the application must be given to the general or testamentary guardian. Van Williams v. Elias, 106 App. Div. 288, 94 N. Y. Supp. 611.

2039, n. 14. Van Williams v. Elias, 106 App. Div. 288, 94 N. Y. Supp. 611.

2057. The proceeding relating to the selection of a special jury, as fixed by sections 1063–1069 of the Code of Civil Procedure, must be strictly followed, and cannot be disregarded in any respect. Industrial & General Trust v. Tod, 104 App. Div. 517, 34 Civ. Proc. R. 287, 93 N. Y. Supp. 725. A list of jurors selected in the absence of the parties or their counsel, the statute directing that it should be done in their presence, is irregular, and ought to be set aside. The purpose sought to be accomplished by requiring that the names be selected in the presence of the parties or their counsel tends to insure the selection of a

jury contemplated by the statute, viz., "most indifferent between the parties and best qualified to try the issue." Id. "It would seem, in view of the fact that the statute requires the selection of the names of persons best qualified to try the issue, that the commissioner, before making the selection, should familiarize himself with it; otherwise it is difficult to see how he can act intelligently or do what the statute requires." Id.

2058, n. 24. Where the court, at special term, has, in the first instance, directed that the jury be struck, and it afterwards appears that any irregularity occurred in the selection of the jury which would render the proceeding a nullity or jeopardize the result sought to be obtained by such jury, the special term has the power and it is its duty to direct that the jury as selected be set aside and discharged, and a new jury be struck. Industrial & General Trust v. Tod, 104 App. Div. 517, 34 Civ. Proc. R. 287, 93 N. Y. Supp. 725.

2063, n. 7. People ex rel. Lazarus v. Coleman, 99 App. Div. 88, 91 N. Y. Supp. 432.

2072, n. 77. The special proceeding is suspended by the death of a sole party so that the referee has no power to make or file a report against such party until a substitution of the personal representative or the successor in interest of the deceased. In re Venable, 93 N. Y. Supp. 1074.

2073, n. 80. This Code provision does not authorize the prosecution of an action by one who has assigned all his interest pending the action and thereafter amended the complaint so as to seek new relief. Foster v. Central Nat. Bank, 93 N. Y. Supp. 603.

2073, n. 81. Hawkins v. Mapes-Reeve Const. Co., 178 N. Y. 236, 242.

2081, n. 141. This Code provision relates to representatives and successors over whom jurisdiction exists in the actions, and which do not include foreign representatives in actions at law. The action cannot be revived against a foreign executor where none of the assets are within the state and no ancillary letters have been issued. McGrath v. Weiller, 98 App. Div. 291, 90 N. Y. Supp. 420.

2095, n. 249. Where plaintiff assigned his interest in a copartnership to one of the defendants, who, together with plaint-

iff's two former partners and others becoming associated with them at the time, continued the business, and plaintiff sued the old and new partners to cancel the assignment on the ground that it was fraudulently procured by the new partners, and demanded an accounting by all of defendants as of the date of the transfer, it was held necessary to revive the action against the representatives of one of the new partners who died after the joinder of issue. Hausling v. Rheinfrank, 103 App. Div. 517, 93 N. Y. Supp. 121.

2120, n. 125. While ordinarily, where it is proper to impose costs as a condition, the plaintiff should be required to pay all the taxable costs to the date of the motion, yet the court, in its discretion, may, in a proper case, impose more moderate terms as to costs. Susman v. Dangler, 95 App. Div. 158, 88 N. Y. Supp. 527.

2121, n. 134. This is the rule where the settlement is collusive to defraud plaintiff's attorney. Rogers v. Marcus, 93 App. Div. 552, 87 N. Y. Supp. 941. It is not proper, however, where the discontinuance is because of a settlement and the plaintiff is financially responsible, to fix the amount of the attorney's lien and direct the payment to the attorney of the sum fixed, as the condition of allowing a discontinuance. Witmark v. Perley, 43 Misc. 14, 86 N. Y. Supp. 756.

2124, n. 1. Rule applied to mandamus proceedings in People ex rel. Arfken v. York, 106 App. Div. 590, 94 N. Y. Supp. 812.

2128. Service of notice of trial after the making of the motion to dismiss is ineffectual. Fisher Malting Co. v. Brown, 92 App. Div. 251, 87 N. Y. Supp. 37.

2140, n. 26. Where real property has been conveyed by a bankrupt to a creditor to secure a title to the property in the trustee, a resort to a court of equity is necessary to declare void the deed or conveyance or to compel the creditor to reconvey. Such an action is in equity; but where the property transferred is personal property, and no written instrument is required to be set aside, and no equitable relief is necessary to enable the trustee to recover the property or its value from creditor to whom it has been transferred, the action is one which must be tried by a jury. Stern v. Mayer, 99 App. Div. 427, 91 N. Y. Supp. 292.

2141. Plaintiff cannot, by an assignment of interests in his claim, deprive defendant of his right to a jury trial in an action otherwise an action at law. Butterly v. Deering, 102 App. Div. 395, 92 N. Y. Supp. 675.

2142, n. 36. The McNulty case is distinguished in Tucker v. Edison Elec. Illuminating Co., 100 App. Div. 407, 91 N. Y. Supp. 439, which holds that the action is triable at special term, on the ground that in the McNulty case it appeared at the time that the jury trial was demanded that the plaintiff had ceased to be entitled to the injunctive relief demanded.

2147, n. 72. Where a reference is ordered on consent and it proceeds without objection, the right to a jury trial is waived. Brooklyn Heights R. Co. v. Brooklyn City R. Co., 105 App. Div. 88, 93 N. Y. Supp. 849.

2152, n. 115. Vandewater v. Mutual Reserve Life Ins. Co., 44 Misc. 316, 89 N. Y. Supp. 845. See, also, vol. 1, p. 1869.

2159, n. 161. This discretion will not be interfered with by the appellate division, on appeal, unless there are controlling reasons therefor. Wurster v. Armfield, 98 App. Div. 298, 90 N. Y. Supp. 699.

2160. In New York county, because of the congested condition of the trial term calendar, issues will not be framed except in an extraordinary case. Evans v. National Broadway Bank, 88 App. Div. 549, 85 N. Y. Supp. 101.

2163, n. 190. Kelly v. Home Sav. Bank, 103 App. Div. 141, 92 N. Y. Supp. 578.

2184. Subdivision 4 is amended by Laws 1904, c. 416, but it is submitted that the change is merely a transposition of words. Subdivision 6 is amended by Laws 1905, c. 436, by adding to those entitled to exemption from jury service the following: "An editor, editorial writer, artist, or reporter of a daily newspaper or press association regularly employed as such and not following any other vocation."

2198, n. 86a. It is error to allow the jury to be asked, in a personal injury case, whether they are connected with a certain insurance company which insures against accidents. Lipschutz v. Ross, 14 Ann. Cas. 52, 84 N. Y. Supp. 32. But it is proper, irrespective of the motive of counsel in asking the question, in a personal injury case, to ask the proposed jurors if they are

interested, as agents or stockholders, in any corporation insuring against liability for negligence. Grant v. National R. Spring Co., 100 App. Div. 234, 91 N. Y. Supp. 805.

2203. When a will is admitted to probate and on appeal an issue is ordered before the supreme court as to whether the will in question was revoked by testator, the right to open and close rests with the contestant rather than the proponent of the will. Matter of Hopkins' Will, 97 App. Div. 126, 89 N. Y. Supp. 561.

2211, n. 172. Eckes v. Stetler, 98 App. Div. 76, 90 N. Y. Supp. 473.

2220, n. 223. This Code section does not authorize the court to direct a view in an action for work done and material furnished. Buffalo Structural Steel Co. v. Dickinson, 98 App. Div. 355, 90 N. Y. Supp. 268.

2223, n. 231. Kurz v. Doerr, 180 N. Y. 88, 91.

2223, n. 232. It seems that proof of the bias of a witness may be elicited before his material testimony is given. Fine v. Interurban St. R. Co., 45 Misc. 587, 91 N. Y. Supp. 43.

2232, n. 281. Cullinan v. Quinn, 95 App. Div. 492, 88 N. Y. Supp. 963.

2236, n. 300. The question of qualification of an expert should not be postponed for determination by cross-examination. Dolan v. Herring-Hall-Marvin Safe Co., 105 App. Div. 366, 94 N. Y. Supp. 241.

2237, n. 308. Where the witness is hostile, and was called under a misapprehension as to what his testimony would be, leading questions are permissible. Zilver v. Robert Graves Co., 106 App. Div. 582, 94 N. Y. Supp. 714.

2237, n. 310. See Brand v. Borden's Condensed Milk Co., 95 App. Div. 64, 88 N. Y. Supp. 460.

2238. The memorandum itself is not evidence. Garber v. New York City R. Co., 92 N. Y. Supp. 722. Where a witness who is not hostile testifies that he did not converse with a named person on a specified evening, counsel may call his attention to his testimony given on a previous trial. Hart v. Maloney, 101 App. Div. 37, 91 N. Y. Supp. 922.

2238, n. 313. A witness who testifies as to the price of milk at a certain time may refer to a newspaper for the purpose of refreshing his recollection as to the price of milk at such time,

proof having been given that such paper was recognized by milkmen as the standard authority on the exchange price of milk. Blanding v. Cohen, 101 App. Div. 442, 92 N. Y. Supp. 93.

2238, n. 314. Taft v. Little, 178 N. Y. 127, 131.

2239, n. 317. Morris v. New York City R. Co., 91 N. Y. Supp. 16.

2241, n. 327. Facts assumed need not be established beyond controversy, it being sufficient that there is some evidence to support them. Becker v. Metropolitan Life Ins. Co., 99 App. Div. 5, 90 N. Y. Supp. 1007.

2246. A witness may be asked how much he has been paid to testify where he admits having been paid. Brown v. Interurban St. R. Co., 43 Misc. 374, 87 N. Y. Supp. 461.

2246, n. 367. Hirsh v. American Dist. Tel. Co., 92 N. Y. Supp. 794.

2247. Ordinarily, a party may show how his adversary's witness was known or discovered, by whom he was subpoenaed, how he has demeaned himself during the trial, with whom he has associated or held converse, and any other circumstances which, like these, may indicate whether the witness is indifferent or more or less a partisan. Iaquinto v. Bauer, 93 N. Y. Supp. 388.

2247, n. 373. Nathan v. Uhlmann, 101 App. Div. 388, 92 N. Y. Supp. 13.

2251, n. 402. Gleason v. Metropolitan St. R. Co., 99 App. Div. 209, 90 N. Y. Supp. 1025.

2251, n. 404. Sexton v. Onward Const. Co., 93 App. Div. 143, 87 N. Y. Supp. 550. Counsel may show in full what has been brought out in part on the cross-examination. Sexton v. Onward Const. Co., 93 App. Div. 143, 87 N. Y. Supp. 550.

2257. The evidence of contradictory statements may consist of written declarations. Fox v. Erbe, 100 App. Div. 343, 91 N. Y. Supp. 832. A judgment roll and an examination in supplementary proceedings, which contained declarations of a party inconsistent with those given upon a trial which sought to set aside a transfer as fraudulent, are not only admissible against the person making them but also against other parties to the action as bearing upon the credibility of the witness. Id.

2258, n. 449. When it is necessary that the whole of the

contradictory writing be read in evidence, see full discussion in Hanlon v. Ehrich, 178 N. Y. 474.

2259, n. 451. Wimmer v. Metropolitan St. R. Co., 92 App. Div. 258, 86 N. Y. Supp. 1052; Goldberg v. Metropolitan St. R. Co., 84 N. Y. Supp. 211.

2261, n. 466. Hetzel v. Easterly, 96 App. Div. 517, 89 N. Y. Supp. 154.

2263, n. 472. A party is not precluded from showing bias of the witness, or that his recollection of the occurrence was unreliable, because of the fact that he was first called by him; the witness' first material testimony having been elicited by the opposing party. Fine v. Interurban St. R. Co., 45 Misc. 587, 91 N. Y. Supp. 43.

2263, n. 476. Ruhl v. Heintze, 97 App. Div. 442, 89 N. Y. Supp. 1031.

2265, n. 485. Buckley v. Westchester Lighting Co., 93 App. Div. 436, 87 N. Y. Supp. 763.

2267, n. 501. Competency as expert. Jenks v. Thompson, 179 N. Y. 20.

2268, n. 504. Gerry v. Siebrecht, 84 N. Y. Supp. 250.

2268, n. 507. Reed v. Spear, 107 App. Div. 144, 94 N. Y. Supp. 1007.

2269, n. 520. Fox v. Erbe, 100 App. Div. 343, 91 N. Y. Supp. 832.

2270, n. 523. Schutz v. Union R. Co., 181 N. Y. 33, 36; Date v. New York Glucose Co., 104 App. Div. 207, 93 N. Y. Supp. 249; Davis v. Reflex Camera Co., 105 App. Div. 96, 93 N. Y. Supp. 844.

2270, n. 530. In a case where it is the practice to allow but one expert witness on a side, the calling another expert after the sustaining an objection to the deposition of an expert on the ground that he was not shown to be qualified, does not waive the exception to the ruling. Wallach v. Manhattan El. R. Co., 105 App. Div. 422, 94 N. Y. Supp. 574.

2271, n. 532. The rule is different, however, where the court states its intention to strike out the evidence to which the party objects because he desires to rebut it. Fox v. Metropolitan St. R. Co., 93 App. Div. 229, 87 N. Y. Supp. 754.

2271, n. 535. Furthermore the ruling cannot be reviewed until after verdict. Bahnsen v. Horwitz, 90 N. Y. Supp. 428.

2272. In the absence of a motion to strike out evidence not called for by the question asked, no reversal will be granted because of such evidence. Roseblatt v. Joseph M. Cohen House Wrecking Co., 91 App. Div. 413, 86 N. Y. Supp. 801.

2273, n. 549. Pescia v. Societa Co-Op., etc., 91 App. Div. 506, 86 N. Y. Supp. 952; Walker v. McCormick, 88 N. Y. Supp. 406. Failure to object is not fatal where the answer is not responsive. Helmken v. City of N. Y., 90 App. Div. 135, 85 N. Y. Supp. 1048.

2274, n. 562. But the motion is timely though not made until the close of the testimony where the inadmissibility of the evidence could not be known until the evidence was all in. Wilkins v. Nassau Newspaper Delivery Exp. Co., 98 App. Div. 130, 90 N. Y. Supp. 678.

2275, n. 565. Powell v. Hudson Valley R. Co., 88 App. Div. 133, 84 N. Y. Supp. 337.

2276, n. 577. Fox v. Metropolitan St. R. Co., 93 App. Div. 229, 87 N. Y. Supp. 754.

2277, n. 578. Failure to strike out until just before the judge's charge is to be delivered does not cure the error. Harkins v. Queen Ins. Co., 106 App. Div. 170, 94 N. Y. Supp. 140.

2280. A dismissal of a complaint in an action at law, is equivalent to a nonsuit, which, in effect, is a determination that the plaintiff's evidence is not sufficient to sustain his cause of action. But after the defendant has been heard, and his evidence taken, if upon all the evidence the plaintiff has established no cause of action, the proper disposition of the case is a direction of a verdict for the defendant and not a dismissal of the complaint, since in an action at law a dismissal of the complaint does not determine the merits of the action. Niagara Fire Ins. Co. v. Campbell Stores, 101 App. Div. 400, 92 N. Y. Supp. 208; Stumpf v. Hallahan, 101 App. Div. 383, 91 N. Y. Supp. 1062.

2280, n. 593. There is no authority for dismissing a complaint upon the merits on a motion for a nonsuit at the close of the plaintiff's case, or at the close of the entire evidence, in an action triable and tried before a jury. Harris v. Buchanan, 100 App. Div. 403, 91 N. Y. Supp. 484.

2292. On directing a verdict for plaintiff, the court should deduct from the verdict so directed the amount of a counterclaim arising out of a distinct transaction pleaded by defendants, or should permit defendants to introduce evidence in support of their counterclaim, and, if established, then deduct the amount thereof. Crane Co. v. Collins, 103 App. Div. 480, 93 N. Y. Supp. 174.

2294, n. 683. But where the motion for a nonsuit was decided after the conclusion of the trial, and was evidenced by an order formally entered at a time when there was no opportunity to take an exception, the appellate division will review the judgment as though a formal exception had been interposed. Sutherland v. St. Lawrence County, 103 App. Div. 597, 93 N. Y. Supp. 958.

2294, n. 684. So where the strict application of the rule holding parties to a waiver of the right to go to the jury where they request a directed verdict and thereafter do not ask leave to go to the jury, would work injustice, it may be waived or disregarded by the appellate court. Rosenstein v. Traders' Ins. Co., 102 App. Div. 147, 92 N. Y. Supp. 326.

2295, n. 691. Bopp v. New York Elec. Vehicle Transp. Co., is reported in 177 N. Y. 33; McDowell v. Syracuse Land & Steamboat Co., 44 Misc. 627, 90 N. Y. Supp. 148.

2297, n. 695. The failure to except to the submission to the jury of the specific questions requiring a special verdict, is not cured by an exception to the direction of a general verdict based thereon. Cooper v. New York, O. & W. R. Co., 180 N. Y. 12.

2297, n. 700. A motion by both parties for the direction of a verdict constitutes an election that the trial judge decide any questions of fact in the case. Rosenstein v. Vogemann, 102 App. Div. 39, 92 N. Y. Supp. 86.

2298, n. 701. Herrmann v. Koref, 47 Misc. 94, 93 N. Y. Supp. 488.

2298, n. 702. German-American Bank v. Cunningham, 97 App. Div. 244, 89 N. Y. Supp. 836.

2301, § 1765. As stated in the text the decisions are in conflict as to whether the appellate division can review the question whether the evidence was sufficient to take the case to the

jury (1) in the absence of a motion to take the case from the jury or (2) in the absence of an exception to the ruling on the motion to take the case from the jury. In the first place, it is submitted that the question whether there is evidence sufficient to make a case for the jury is a question of law, and while exceptions to the rulings on questions of law are not necessary for a review on a motion for a new trial they are necessary, except in cases involving peculiar circumstances, to obtain a review of the ruling on an appeal to the appellate division. Accordingly, the rule supported by the weight of authority is that there must not only be a motion to take the case from the jury but also an exception thereto to enable the appellate division on appeal to review the question whether there was "any" evidence constituting a cause of action or a defense, as the case may be, which should have been submitted to the jury. This rule is supported by the late cases of Collier v. Collins, 172 N. Y. 101; Perry v. Village of Potsdam, 106 App. Div. 297, 94 N. Y. Supp. 683; and Muratore v. Pirkl, 104 App. Div. 133, 93 N. Y. Supp. 484. Of course, a motion to take the case from the jury is not necessary to review of the question whether there is "sufficient," as distinguished from "any," evidence to support the verdict (Citizens' Bank v. Rung Furniture Co., 67 App. Div. 471, 78 N. Y. Supp. 604). It is submitted that the rule that a motion and exception are necessary to authorize a review on appeal to determine whether there is "any" evidence which should have been submitted to the jury, is independent of the question whether a motion for a new trial is made or an appeal taken from the order entered on such motion, since the latter procedure is necessary only where questions of fact are sought to be reviewed.

2302, n. 720a. Instruction to disregard was held not to cure the error in Benoit v. New York Cent. & H. R. R. Co., 94 App. Div. 24, 87 N. Y. Supp. 951.

2302, n. 721. Diamond v. Planet Mills Mfg. Co., 97 App. Div. 43, 89 N. Y. Supp. 635.

2308, n. 751. Kinne v. International R. Co., 100 App. Div. 5, 90 N. Y. Supp. 930.

2324. The judge may read and comment on the pleadings for the purpose of defining the issue, and showing what part of

the allegations are admitted, though the pleadings have not formally been put in evidence. Foley v. Y. M. C. A., 92 N. Y. Supp. 781.

2328. An instruction that defendant's witnesses, being "sworn officers of the law," are entitled to more credit than plaintiff, is erroneous. Durst v. Ernst, 45 Misc. 627, 91 N. Y. Supp. 13.

2328, n. 866. See, also, Beers v. Metropolitan St. R. Co., 88 App. Div. 9, 84 N. Y. Supp. 785.

2328, n. 868. Kapiloff v. Feist, 91 N. Y. Supp. 27.

2331, § 1794. It is proper to refuse to charge in a civil case, even where the complaint incidentally alleges the commission of a crime such as an assault, that defendant is presumed innocent until he is proven guilty. Kurz v. Doerr, 180 N. Y. 88.

2332. The court should not charge that the jury may consider the fact that defendant produced no witnesses, in the absence of evidence that defendant had any witnesses which it could produce, and where there is no showing that anybody except the witnesses examined by plaintiff can testify upon the subject. Robinson v. Metropolitan St. R. Co., 103 App. Div. 243, 92 N. Y. Supp. 1010. So it is proper to refuse to charge that "if the plaintiff has failed to call a witness who could throw any light on the subject, the jury may infer from their not calling him that he would not help their side." Baldwin v. Brooklyn Heights R. Co., 99 App. Div. 496, 91 N. Y. Supp. 59.

2333, n. 897. Reiss v. Kienle, 88 N. Y. Supp. 359.

2335, n. 916. Frank v. Metropolitan St. R. Co., 91 App. Div. 485, 86 N. Y. Supp. 1018.

2336. Exception to a refusal to charge certain requests are waived by the failure to accept the offer of the court to recall the jury and charge the requests refused. Drucklieb v. Universal Tobacco Co., 106 App. Div. 470, 94 N. Y. Supp. 777.

2336, n. 924. To same effect, see Buckley v. Westchester Lighting Co., 93 App. Div. 436, 87 N. Y. Supp. 763.

2337, n. 928. Keating v. Mott, 92 App. Div. 156, 86 N. Y. Supp. 1041; Buckley v. Westchester Lighting Co., 93 App. Div. 436, 87 N. Y. Supp. 763.

2340, n. 948. The judge should not send the court stenog-

rapher into the jury room to read to the jury the evidence on a material question. Otto v. Young, 43 Misc. 628, 88 N. Y. Supp. 188.

2349, n. 1005. But see Smith v. Lehigh Valley R. Co., 94 App. Div. 125, 87 N. Y. Supp. 1035.

2357, n. 1056. While the practice is not regular, it does not make the judgment void. Dubuc v. Lazell, Dalley & Co., 182 N. Y. 482, reversing 105 App. Div. 533, 94 N. Y. Supp. 1144. Consent that the clerk receive and enter the verdict does not constitute an estoppel. Morris v. Harburger, 100 App. Div. 357, 91 N. Y. Supp. 409.

2366. A verdict for plaintiff against a named defendant cannot be amended some two years later by adding the words "and in favor of" other named defendants, though the application is made to the particular judge who sat at the trial term when the case was heard. Duerr v. Consolidated Gas Co., 104 App. Div. 465, 93 N. Y. Supp. 766.

2367, n. 1132. See, also, McAfee v. Dix, 101 App. Div. 69, 91 N. Y. Supp. 464.

2377, n. 26. An oral announcement of the judge's views of the controversy, taken in the stenographer's minutes and transcribed, without being entitled, dated, or signed is insufficient as a decision. Dobbs v. Brinkerhoff, 98 App. Div. 258, 90 N. Y. Supp. 480.

2378, n. 30. Neither the entry in the clerk's minutes nor the opinion of the court can take the place of the formal decision required by the Code. Electric Boat Co. v. Howey, 96 App. Div. 410, 89 N. Y. Supp. 210. A judgment entered without any decision having been filed, being unauthorized by law, cannot be amended.

2379, n. 31. It is proper for a party to prepare and submit, at the request of the court, and without notice to the opposing party, the findings as signed. The opposing party may then move for a resettlement, but cannot make an ex parte application for additional findings. Bernheim v. Bloch, 45 Misc. 581, 91 N. Y. Supp. 40.

2382, nn. 66, 68. Officially reported in 90 App. Div. 553.

2388, § 1847. If no exception is filed to the decision and no exceptions were taken on the trial, there is nothing for an ap-

pellate court to review. Dunleavey v. Dunleavey, 87 App. Div. 601, 84 N. Y. Supp. 562.

2555, n. 18. The resignation of a referee after his appointment and service for a considerable time is a "refusal to serve," within section 1011 of the Code, so as to require the court to appoint another referee. Brooklyn Heights R. Co. v. Brooklyn City R. Co., 105 App. Div. 88, 95 N. Y. Supp. 849.

2561, n. 64. See, also, Gibson v. Widman, 106 App. Div. 388, 94 N. Y. Supp. 593.

2565, nn. 85, 87, 89. Prentice v. Huff, 98 App. Div. 111, 90 N. Y. Supp. 780.

2568, n. 109. Gibson v. Widman, 106 App. Div. 388, 94 N. Y. Supp. 593.

2583, § 1867. In the first judicial district, the appellate division is authorized, by Laws 1905, c. 204, p. 422, to appoint certain ex-judges over sixty-five years of age to act as official referees in cases where, for any reason, the expense of the reference should not be borne by the parties. Such referees receive a salary.

2617. A judgment was reversed in Cohen v. Wittemann, 100 App. Div. 338, 91 N. Y. Supp. 493, because the findings of fact and conclusions of law were inconsistent and irreconcilable.

2625, § 1901. In Mercantile Nat. Bank v. Sire, 100 App. Div. 491, 91 N. Y. Supp. 419, where a report was delivered by a referee in ignorance of a stipulation extending the defendant's time to file a brief, the case was sent back to the referee for reconsideration.

2648, n. 640. Matter of Venable, 104 App. Div. 531, 93 N. Y. Supp. 1074.

2666, n. 97. Iaquinto v. Bauer, 104 App. Div. 56, 58, 93 N. Y. Supp. 388; Sivin v. Mutual Match Co., 46 Misc. 244, 91 N. Y. Supp. 771; Empire Trust Co. v. Devlin, 45 Misc. 583, 90 N. Y. Supp. 1066.

2671, n. 126. The recollection of the trial judge as to a colloquy between the court and the counsel is conclusive on the appellate court which will not interfere with the record. Burke v. Baker, 104 App. Div. 26, 93 N. Y. Supp. 215.

2685, n. 7. In the absence of an exception to the dismissal of the complaint at the close of plaintiff's evidence, the pro-

priety of such dismissal cannot be reviewed by the appellate division where the appeal is from the judgment only, there being no motion for a new trial. Muratore v. Pirkl, 104 App. Div. 133, 93 N. Y. Supp. 484.

2693. Setting aside verdict as against the weight of evidence though no evidence is introduced for defendant, see Surkin v. Interborough St. R. Co., 45 Misc. 407, 90 N. Y. Supp. 342.

2693, n. 42. If reasonable men might differ as to the result that ought to have been reached by the jury, the verdict should not be set aside. Von Der Born v. Schultz, 104 App. Div. 94, 93 N. Y. Supp. 547.

2693, n. 47. See, also, Schnitzler v. Oriental Metal Bed Co., 93 N. Y. Supp. 1118.

2694, n. 50. Walker v. Newton Falls Paper Co., 99 App. Div. 47, 90 N. Y. Supp. 530.

2695, n. 59. But see Meinrenken v. New York Cent. & H. R. R. Co., 103 App. Div. 319.

2698, n. 85. Meyers v. Zucker, 91 N. Y. Supp. 358.

2701, n. 106. See, also, Bernikow v. Pommerantz, 94 N. Y. Supp. 487.

2702, nn. 116–118. That a juror disclosed the verdict on the way from the jury room to the court room cannot be taken advantage of after the rendition of the verdict, where the objecting party knew of it before the verdict was rendered. Bernikow v. Pommerantz, 94 N. Y. Supp. 487.

2705, n. 139. Seligman v. Sivin, 46 Misc. 58, 91 N. Y. Supp. 395. Especially should such rule be rigidly enforced where five trials have been had and the witnesses were readily accessible. Hagen v. New York Cent. & H. R. R. Co., 100 App. Div. 218, 91 N. Y. Supp. 914, which reverses 44 Misc. 540, 90 N. Y. Supp. 125. But the fact that the evidence is not discovered until after a third trial is not necessarily fatal. Beers v. West Side R. Co., 101 App. Div. 308, 312, 91 N. Y. Supp. 957.

2707, n. 157. Where the verdict rests on plaintiff's unsupported and contradictory evidence, which was met at every point by witnesses most of whom were disinterested, a new trial should be granted to defendant though the newly-discov-

ered evidence is merely cumulative. Schnitzler v. Oriental Metal Bed Co., 93 N. Y. Supp. 1119.

2708. Where the verdict for plaintiff is based on the evidence of one witness, and there is a strong showing that he committed perjury, a new trial should be ordered. Chapman v. Delaware, L. & W. R. Co., 102 App. Div. 176, 92 N. Y. Supp. 304.

2708, n. 167. The Chapman case is officially reported in 102 App. Div. 176.

2708, n. 168. But where the most material witness for plaintiff on the subject of damages makes an affidavit that her testimony was false, and her statements in her affidavit are corroborated by other affidavits, a new trial should be granted. O'Hara v. Brooklyn Heights R. Co., 102 App. Div. 398, 92 N. Y. Supp. 777.

2710. Surprise as to the decision is not ground for a new trial. McWhirler v. Bowen, 103 App. Div. 447, 92 N. Y. Supp. 1039.

2711, nn. 189, 190. Carlisle v. Barnes is affirmed in 102 App. Div. 582, 92 N. Y. Supp. 924.

2711, n. 191. But this rule does not apply where manufactured evidence is introduced. Seligman v. Sivin, 46 Misc. 58, 91 N. Y. Supp. 395.

2714, n. 212. Harvey v. Fargo is officially reported in 99 App. Div. 599. Compare Seligman v. Sivin, 46 Misc. 58, 91 N. Y. Supp. 395, where rule was held not to apply.

2729, n. 80. So held where motion was based on surprise, mistake, etc. McWhirter v. Bowen, 103 App. Div. 447, 92 N. Y. Supp. 1039.

2733, n. 116. Hagen v. New York Cent. & H. R. R. Co., 44 Misc. 540, 90 N. Y. Supp. 125, is reversed in 100 App. Div. 218, 91 N. Y. Supp. 914, where it is said that while the credibility of witnesses is for the jury, yet the reputation and character of the newly-discovered witnesses should not be disregarded in determining the motion.

2743. On setting aside a verdict because of a charge of perjury, the costs of the motion and the reference incidental thereto should abide the event. Chapman v. Delaware, L. & W. R. Co., 102 App. Div. 176, 180, 92 N. Y. Supp. 304. On granting

a new trial because of surprise, an extra allowance should not be awarded. Simpson v. Hefter, 46 Misc. 67, 91 N. Y. Supp. 326.

2743, n. 179. Larsen v. United States Mortg. & Trust Co., 104 App. Div. 76, 82, 93 N. Y. Supp. 610.

2745, § 1960. An order granting a new trial will not be set aside because a wrong reason was given for granting it. Ross v. Metropolitan St. R. Co., 104 App. Div. 378, 382, 93 N. Y. Supp. 679.

2756. Judgment of dismissal, in an action tried without a jury, as on the merits, where dismissal was because action was prematurely brought, see Ruegamer v. Cieslinskie, 93 N. Y. Supp. 599.

2756, n. 34. Weeks v. Van Ness, 104 App. Div. 7, 93 N. Y. Supp. 337.

2763, § 1969. A prayer for such further judgment as may be necessary may sustain a personal judgment in an action to foreclose a mechanic's lien. Schenectady Contracting Co. v. Schenectady R. Co., 106 App. Div. 336, 94 N. Y. Supp. 401.

2763, n. 85. Hasbrouck v. New Paltz, H. & P. Traction Co., is officially reported in 98 App. Div. 563.

2763, n. 87. See, also, Mathot v. Triebel, 102 App. Div. 426, 92 N. Y. Supp. 512.

2764, n. 90. Mathot v. Triebel, 102 App. Div. 426, 92 N. Y. Supp. 512.

2764, n. 95. Where the complaint alleges a contract but the contract is void under the statute of frauds, a recovery on a quantum meruit is not allowable where the question as to the value of the services is not litigated on the trial and the complaint which contains no allegations on which such a recovery can be founded is not amended. Banta v. Banta, 103 App. Div. 172, 93 N. Y. Supp. 393. Where plaintiff alleged that on or about January 1, 1900, defendant hired him to work for it for the period of one year, beginning January, 1900, judgment cannot be recovered on evidence of employment antecedent to that year and a holding over for another year. Treffinger v. M. Groh's Sons, 100 App. Div. 433, 91 N. Y. Supp. 837.

2765. Where plaintiff sues for an injunction and for past damages, and the case is tried at special term, a judgment for

damages only cannot be rendered, where defendant set up in his answer that there was a full and adequate remedy at law. Sadlier v. City of N. Y., 104 App. Div. 82, 93 N. Y. Supp. 579. To same effect, see Western Union Tel. Co. v. Electric Light & Power Co., 178 N. Y. 325, 329. And the fact that the defendant noticed the case for trial at the special term under its stipulation to that effect does not alter the rule. Sadlier v. City of N. Y., 104 App. Div. 82, 93 N. Y. Supp. 579.

2765, n. 102. There is a considerable conflict of opinion (1) as to whether a complaint which sets up an equitable cause of action with a demand solely for equitable relief is demurrable for failure to state a cause of action where a legal cause of action is also contained in the same facts alleged in the complaint (see vol. 1, pp. 1000, 1001), and (2) as to whether, where a complaint seeks both equitable and legal relief, and it appears on the trial at special term that only legal relief can be granted, the complaint should be dismissed or the cause sent to a jury for trial, or the special term should retain the case and grant the legal relief. In the case of Tucker v. Edison Elec. Illuminating Co., 100 App. Div. 407, 91 N. Y. Supp. 439, the action was to enjoin a nuisance and to recover damages. It appeared before trial, but not on the motion to send the case to the trial term calendar which was denied, that pending the action the nuisance had been so far abated that an injunction should not be issued. It was held that the special term had power to assess the damages and that a judgment for legal relief was proper. The case of McNulty v. Mt. Morris Electric Light Co., 172 N. Y. 410, was distinguished on the ground that in that case the fact that plaintiff was not entitled to injunctive relief because of events occurring after the commencement of the action was shown at the time the motion was made to send the case to the trial term for a trial by jury. McLaughlin J., wrote a dissenting opinion in which Van Brunt, P. J., concurred. In the dissenting opinion will be found the cases which support the contrary rule.

2765, n. 105. But where a complaint contains a statement of acts constituting a cause of action on a contract, which is sustained by proof, a recovery is authorized though the complaint

also contains allegations of a tort. Booth v. Englert, 105 App. Div. 284, 94 N. Y. Supp. 700.

2780, § 1977. The court does not lose jurisdiction of the motion for final judgment because the argument was brought on during one term and a reargument was heard by the judge after the commencement of his second term of office. Jewett v. Schmidt, 45 Misc. 471, 92 N. Y. Supp. 737.

2782, n. 199. Where a party dies after the entry of an interlocutory judgment, the final judgment is to be entered in the names of the original parties. Jewett v. Schmidt, 45 Misc. 471, 92 N. Y. Supp. 737.

2785, § 1984. Where, after the reargument of a motion for final judgment after the entry of an interlocutory judgment, a child is born whose interests are such that he would be a necessary party to the action, the court may direct the entry of judgment nunc pro tunc as of the date of the motion for judgment, where prejudice would otherwise result to the successful party from the delay in the decision of the case. Jewett v. Schmidt, 45 Misc. 471, 92 N. Y. Supp. 737.

2790, § 1994. A judgment of foreclosure of a mortgage cannot be docketed until a deficiency has been ascertained. French v. French, 107 App. Div. 107, 94 N. Y. Supp. 1028.

2796. A personal decree for the deficiency, in a mortgage foreclosure suit, after the application of the proceeds of sale to pay the mortgage debt, does not have the force and effect of a judgment at law, and become a lien upon the real property of the person against whom it is taken, until the excess of the mortgage debt over the proceeds of the sale has been ascertained, and a subsequent judgment at law has been docketed. French v. French, 107 App. Div. 107, 94 N. Y. Supp. 1026.

2797, § 2001. The lien on land taken by condemnation proceedings attaches to the award with all the rights and liabilities which the judgment creditor would have, and be subject to, as to the land. Van Loan v. City of N. Y., 105 App. Div. 572, 94 N. Y. Supp. 221.

2802, n. 314. Rule applied where right to sue for award was suspended by statute for four months. Van Loan v. City of N. Y., 94 N. Y. Supp. 221.

2817, n. 405. Where a judgment is void because of the rela-

tionship of the trial judge to a party, it may be vacated on motion. Whether such a judgment is reversible on appeal or the appeal will be dismissed, quere. Elmira Realty Co. v. Gibson, 103 App. Div. 140, 92 N. Y. Supp. 913.

2819, n. 415. That rule as to collateral attack does not apply to an action on a "foreign" judgment, see Prichard v. Sigafus, 103 App. Div. 535, 93 N. Y. Supp. 152.

2820, n. 419. Carlisle v. Barnes is affirmed in 102 App. Div. 582, 92 N. Y. Supp. 924.

2820, n. 422. See, also, Reich v. Cochran, 105 App. Div. 542, 94 N. Y. Supp. 404.

2825, n. 455. But see, as contra, Riley v. Ryan, 45 Misc. 151, 91 N. Y. Supp. 952.

2827, n. 466. Riley v. Ryan, 45 Misc. 151, 91 N. Y. Supp. 952.

2835, n. 506. Followed in Howe v. Noyes, 47 Misc. 338, 93 N. Y. Supp. 476.

2836. A grantee of real estate formerly owned by the bankrupt and on which the judgment is a lien may move to cancel the judgment against the bankrupt, since the right to move is not personal to the bankrupt. Graber v. Gault, 103 App. Div. 511, 93 N. Y. Supp. 76.

2836, n. 510a. The burden rests on the moving party, whether he be the bankrupt or one who has succeeded to the bankrupt's right, to establish the necessary facts to show that the discharge in bankruptcy operated on the debt represented by the judgment. He must show that the debt was scheduled or that the creditor had actual notice or knowledge of the proceeding. Graber v. Gault, 103 App. Div. 411, 93 N. Y. Supp. 76; Schiller v. Weinstein, 47 Misc. 622, 94 N. Y. Supp. 763.

2836, n. 511. Dodge v. Kaufman, 91 N. Y. Supp. 727.

2837, § 2034. Inasmuch as costs belong to the client, and not to the attorney, the client may satisfy a judgment awarding him costs. Earley v. Whitney, 106 App. Div. 399, 94 N. Y. Supp. 728.

2842, n. 531. This Code provision does not apply to an action on a final order made in a special proceeding. Fenlon v. Paillard, 46 Misc. 151, 93 N. Y. Supp. 1101.

2842, n. 534. Fenlon v. Paillard, 46 Misc. 151, 93 N. Y. Supp. 1101.

2847, n. 4. A judgment by default is of no effect against "Samuel Durst" where summons was against "Samuel Dust." Durst v. Ernst, 45 Misc. 627, 91 N. Y. Supp. 13.

2853, n. 55. Mathot v. Triebel, 102 App. Div. 426, 92 N. Y. Supp. 512.

2862, n. 94. Where, in an action for injury to property, defendant makes default, the damages under Code Civ. Proc. § 1215, can only be ascertained by a writ of inquiry. Fullerton v. Young, 46 Misc. 292, 94 N. Y. Supp. 511. A conversion to defendant's own use of money collected by him as agent is an "injury to property," within Code Civ. Proc. § 1215, requiring damages on default in such a case to be ascertained by writ of inquiry. Id.

2867, § 2054. In assessing the damages the allegations of the complaint are required to be treated as true the same as if no answer had been interposed. The damages are assessable as if the defeated party had made default in pleading. City Trust, Safe Deposit & Surety Co. v. American Brewing Co., 181 N. Y. 285.

2868, § 2055. The denial of a "motion" to open a default and to be permitted to defend does not preclude an "action" to set aside the judgment. Everett v. Everett, 180 N. Y. 452, 461. Where a party is actually represented by counsel in court, fully prepared to try the cause, and such counsel refuses to proceed for the sole reason that he thinks the justice presiding may decide against him, the judgment thus rendered cannot be vacated as though taken by default, and no reason can be suggested for disturbing it which could not be urged with equal force to vacate a judgment alleged to have resulted from the incompetence of the attorney conducting the trial. Sutter v. City of N. Y., 106 App. Div. 129, 94 N. Y. Supp. 515.

2869, § 2057. The fact that a defendant not properly served with summons knows of the action and the taking of a default judgment therein, but takes no steps to prevent such judgment, does not preclude his right to move to have the default judgment set aside. O'Connell v. Gallagher, 93 N. Y. Supp. 643.

2870, n. 150. Where defendant made no application to postpone the trial because of the illness of one of his attorneys, but

instead deliberately abandoned the case and left the county, and he offers no real excuse for his disregard of the case and of the court, the default will not be opened. Brown v. Huber, 103 App. Div. 134, 92 N. Y. Supp. 940.

2875, n. 190. See, also, Cohen v. Meryash, 93 N. Y. Supp. 529.

2875, § 2065. After an inquest, the default should not be opened on payment merely of motion costs, but there should be added a trial fee and plaintiff's disbursements. Siegel v. Frankel, 93 N. Y. Supp. 533.

2901, § 2077. Costs cannot be awarded in a proceeding to punish for criminal contempt, since there is no statutory authority therefor. People ex rel. Stearns v. Marr, 181 N. Y. 463, 471.

2906, n. 53. It follows that an order for dismissal of the complaint cannot be made conditional on a waiver of the costs of the action by defendant, unless the plaintiff should appeal, in which case defendant was to have his costs. Thiel v. Schonzeit, 104 App. Div. 151, 93 N. Y. Supp. 383.

2927, n. 202. If the action is unnecessary, defendant is properly awarded costs. Millard v. Breckwoldt, 100 App. Div. 44, 48, 90 N. Y. Supp. 890.

2933, § 2096. While the statute authorizes the imposition of costs in a proceeding to punish for a civil contempt, there is no such authority in a case for criminal contempt, since the latter is a criminal proceeding and not a special proceeding such as defined by the Code. People ex rel. Stearns v. Marr, 181 N. Y. 463, 471.

2934, n. 249. See, also, In re Rapid Transit Com'rs, 103 App. Div. 530, 93 N. Y. Supp. 262.

2936. Costs should not be imposed on a moving party whose motion is denied, where the motion is not opposed by the counsel who appear in behalf of the party against whom the application is made. In re Collins' Estate, 93 N. Y. Supp. 342.

2942. In an action to foreclose several mechanics' liens filed by different persons, it is improper to allow the owner separate bills of costs against unsuccessful lienors who filed separate liens, since only one bill of costs can be allowed to one party in

such a case. Woolf v. Schaefer, 103 App. Div. 567, 573, 93 N. Y. Supp. 184.

2997, § 2158. An order affirming the report of a referee and directing further proceedings by the receiver in the action, being an order made on a motion in the action cannot award a sum to the attorney for the receiver as an extra allowance in lieu of costs. Adams v. Elwood, 104 App. Div. 138, 93 N. Y. Supp. 327.

3001, n. 743. Propriety of allowances in action to construe will, see Rothschild v. Goldenberg, 103 App. Div. 235, 242.

3003. Where the answer admits the right of plaintiff to recover the amount demanded in the complaint, but sets up a counterclaim under which the defendant recovers less than the amount admitted to be due plaintiff, the fact that the case is a difficult and extraordinary one does not authorize the granting of an additional allowance to plaintiff, where the difficulty arose in regard to the counterclaim as to which defendant prevailed. Huber v. Clark, 105 App. Div. 127, 93 N. Y. Supp. 1090.

3003, n. 758. Leonard v. Union R. Co., 98 App. Div. 204, 90 N. Y. Supp. 574.

3005, n. 782. In mortgage foreclosure cases, it is not necessary that a defense be interposed to authorize the extra allowance. Badger v. Johnston, 106 App. Div. 237, 94 N. Y. Supp. 421.

3013, n. 837. Kitching v. Brown is reported in 180 N. Y. 414.

3022, n. 919. But where the judgment as entered contains a vacant space wherein the costs can be inserted, it is within the power of the court to amend the judgment by permitting, in addition to the regular costs, an extra allowance. Bowers v. Male, 102 App. Div. 609, 92 N. Y. Supp. 183.

3023, nn. 927–929. In Badger v. Johnston, 106 App. Div. 237, 94 N. Y. Supp. 421, a notice in a mortgage foreclosure suit, on default, for the relief demanded in the complaint, was held broad enough to authorize an extra allowance, without further notice.

3024. In the absence of objection or exception at the time of the allowance, the appellate division will not, it seems, inter-

fere therewith, especially where it is supported by equitable reasons. Schiff v. Tamor, 93 N. Y. Supp. 853.

3025, n. 941. Kitching v. Brown is reported in 180 N. Y. 414.

3034, n. 999. Talcott v. Wabash R. Co., is officially reported in 99 App. Div. 239.

3036, n. 1020. Crotty v. De Dion-Bouton Motorette Co., 102 App. Div. 405, 92 N. Y. Supp. 619.

3047, § 2193. It is well settled that all the parties to an action (and the same rule applies to a special proceeding) are liable for the fees of a referee, even including those parties, if any, who objected to the appointment of a referee. And the same rule applies to the fees of an unofficial stenographer employed with the consent and acquiescence of the parties.

3048, n. 11. So is a stipulation that the referee "may charge and be paid a reasonable compensation for the services performed." New York Mut. Sav. & L. Ass'n v. Westchester Fire Ins. Co., 98 App. Div. 285, 90 N. Y. Supp. 710.

3071, n. 81. See, also, Schiller v. Weinstein, 94 N. Y. Supp. 764.

3083. Where it appears, on an application for leave to issue execution on a judgment against an administrator, that a fund held by the administrator consists of a part of the proceeds of a judgment against the government in favor of the decedent, and the affidavit of the administrator expressly avers that there is not property in his hands applicable to the judgment, the court should direct an accounting. In re Warren, 105 App. Div. 582, 94 N. Y. Supp. 286.

3138, n. 545. Higgins v. Downs, 101 App. Div. 119, 91 N. Y. Supp. 937.

3151, n. 657. As a defense, defendant may prove that the judgment creditor assigned the judgment on which the execution was based, before the issuance of the execution. Matter of Mawson, 182 N. Y. 234.

3192, n. 936a. The Durst case is officially reported in 45 Misc. 627.

3193, n. 945. An execution creditor who gives no specific instructions to the officer as to the levy to be made is not liable for the act of the officer in levying on the property of a third

person. Milella v. Simpson, 47 Misc. 690, 94 N. Y. Supp. 464; Siersema v. Meyer, 38 Misc. 358, 77 N. Y. Supp. 901.

3197, n. 5. Davids v. Brooklyn Heights R. Co., is reversed in 104 App. Div. 23, 93 N. Y. Supp. 285, on this point.

3199, n. 12. But there must be proof that the defendant knew the allegations to be false. Booth v. Englert, 105 App. Div. 284, 94 N. Y. Supp. 700.

3200, § 2303. On a motion to set aside a body execution on the ground that the action is not one in which such an execution can issue, the moving party may show the theory on which the action was tried and decided. Booth v. Englert, 105 App. Div. 284, 94 N. Y. Supp. 700.

3216. Judicial sales are not within the statute forbidding the sale of lands in the possession of a third person who claims under an adverse title. Da Garmo v. Phelps, 176 N. Y. 455.

3230, n. 103. A judicial sale cannot be set aside, "as a matter of right," because the sale was in mass. Vingut v. Ketcham, 102 App. Div. 403, 92 N. Y. Supp. 605.

3232. The order cannot substantially amend the judgment, under which the sale was made. Vingut v. Ketcham, 102 App. Div. 403, 92 N. Y. Supp. 605.

3232, n. 117. Terms may be imposed where the setting aside of the sale rests in the discretion of the court. Vingut v. Ketcham, 102 App. Div. 403, 92 N. Y. Supp. 605.

3239. Where the purchaser seeks relief from his purchase by motion, he must offer evidence in justification of his refusal to perform, unless the defect is patent in the record. Title Guarantee & Trust Co. v. Fallon, 101 App. Div. 187, 91 N. Y. Supp. 497.

3258, n. 27. The assignee of the judgment may institute the proceeding in the name of the assignor. Maigille v. Leonard, 102 App. Div. 367, 92 N. Y. Supp. 656.

3300, n. 331. Thompson v. Sage, 47 Misc. 357, 94 N. Y. Supp. 31.

3333, n. 546. Thompson v. Sage, 47 Misc. 357, 94 N. Y. Supp. 31.

3340, n. 604a. Contra, Field v. White, 102 App. Div. 365, 92 N. Y. Supp. 848.

3350, n. 671. A receiver should not be appointed where the proof shows that the judgment debtor has no property applicable to the payment of the judgment, and where it may result in harassing the debtor without any benefit accruing to the petitioner. Matter of Stafford, 105 App. Div. 46, 94 N. Y. Supp. 194.

3365. A receiver obtains no title or interest in the debtor's right of possession of premises sold under execution, since until the sheriff's deed is delivered, the debtor's right to possession is in the nature of an exemption. Steenberge v. Low, 46 Misc. 285, 289, 92 N. Y. Supp. 518. An award in condemnation proceedings takes the place of the land, so as to remain subject to the judgment lien on the land and payable to the receiver. Van Loan v. City of N. Y., 94 N. Y. Supp. 221, affirming 45 Misc. 482, 92 N. Y. Supp. 734.

3367. The receiver has not a sufficient title to sue for partition of real property. Steenberge v. Low, 46 Misc. 285, 92 N. Y. Supp. 518. The right of the receiver to recover an award for lands of the judgment debtor taken by condemnation proceedings is not limited to the ten years during which the judgment is a lien, but exists for the twenty years during which the judgment is in force. Van Loan v. City of N. Y., 45 Misc. 482, 92 N. Y. Supp. 734; affirmed, without ruling on this point, in 94 N. Y. Supp. 221.

3367, n. 780. See, also, Van Loan v. City of N. Y., 105 App. Div. 572, 94 N. Y. Supp. 221.

3368, n. 788. Ten days' notice of the sale must be given. Rawolle v. Kalbfleisch, 47 Misc. 364, 94 N. Y. Supp. 16.

3368, n. 790. Gross inadequacy of price is sufficient ground for setting aside the receiver's sale. Rawolle v. Kalbfleisch, 47 Misc. 364, 94 N. Y. Supp. 16.

3390, n. 40. But where, owing to the nonresidence of the defendant debtors, and to their lack of property other than the trust estate, the plaintiffs are without a remedy at law, and cannot comply with the usual conditions precedent to the commencement of a suit in equity to reach equitable assets not liable to be levied on by execution, the recovery of a judgment and the return of an execution unsatisfied are not conditions precedent. Bateman v. Hunt, 46 Misc. 346, 94 N. Y. Supp. 861.

3391, n. 48. See, also, Bateman v. Hunt, 46 Misc. 346, 94 N. Y. Supp. 861.

3417, n. 216. See, also, Wahlheimer v. Truslow, 106 App. Div. 73, 94 N. Y. Supp. 137.

3418, n. 217. But it is not necessary to file a lis pendens to create a lien though the judgment debtor is discharged in bankruptcy after the commencement of the action, where no trustee in bankruptcy has been appointed. Wahlheimer v. Truslow, 94 N. Y. Supp. 137.

3417, n. 222. Wahlheimer v. Truslow, 106 App. Div. 73, 94 N. Y. Supp. 137.

3420, n. 230. Wahlheimer v. Truslow, 106 App. Div. 73, 94 N. Y. Supp. 137.

3428. Where there is only one plaintiff and his claim can be satisfied by making the judgment applicable to a particular sum of money sufficient to satisfy it, it is not necessary that all the fraudulent transfers of personal property be set aside. Fox v. Erbe, 100 App. Div. 343, 348, 91 N. Y. Supp. 832.

3429, n. 292. Where no accounting is necessary in a suit by one creditor to set aside a fraudulent assignment by the debtor of all his property, a money judgment is proper. Wahlheimer v. Truslow, 106 App. Div. 73, 94 N. Y. Supp. 137.

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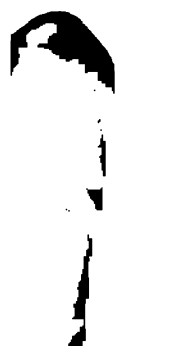

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